HIGH COURT RULINGS

INCOME TAX MANUAL

VOLUME II.

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BENGAL HIGH COURT CASE, NO. 40 OF 1920.

I. L. R., Vol. XLVIII, Calcutta, page 766.

Birendra Kishor Manikya

v.

Secretary of State for India.

Income-tax Act (VII of 1918), section 2 (*1*) (*a*).—Illegal fees exacted from tenants—Premia for settlement of waste land.

"There can be little doubt that when a lease is granted, the amount fixed for periodical payment is not independent of the amount paid in a lump sum as premium. The capitalised value of the sum periodically payable taken along with the premium constitute in the aggregate the consideration for the grant; so that the larger the one element, the smaller the other. From this point of view, we must hold that the premium paid for the settlement of waste lands or abandoned holdings may reasonably be regarded as 'rent or revenue' derived from land, within the meaning of that expression as used in the definition of 'agricultural income,' in section 2 (*1*) (*a*).

But these considerations do not apply to the *salami* or premium paid for recognition of a transfer of a holding from one tenant to another. When the transfer is recognised, the original tenancy continues, and there is no new demise. The sum paid as *salami* or premium in such circumstances is obviously not rent in any sense of the term; nor can it be deemed the return, yield, or profit of any land. The money is paid by the transferee to the landlord to purchase peace, so that he may not contest the validity of the transfer. We cannot hold that money so levied by the landlord can be comprised within the scope of the definition of agricultural income.

Finally, the contention that illegal *abwabs*, such as *uttarayan*, constitute agricultural income, is manifestly untenable. The item *uttarayan* is a voluntary payment, made by tenants, at one pice per rupee of their rents, for expenses of the *Bastu Puja* on the *Uttarayan Sankranti* day (the last day of the Bengali month *Pous*) and for distribution of sweets and oranges to all servants of the estate, Government officers and local residents. The item consequently is an illegal exaction and cannot, on the widest interpretation which may be placed on the phrase 'rent or revenue,' be possibly included therein; nor can it be said to be derived, that is drawn, or obtained from the land. We do not feel pressed by the contention that if the income from the *uttarayan* be treated as assessable, there would be an indirect recognition of it by Government; for, all that we have to consider is, whether it is exempted from assessment, because, if not exempted, it must be taxed as included in the all comprehensive expression in section 3 (*1*), namely 'income from whatever source it is derived.' Reference may in this connection be made to the decision in *Patridge* v. *Mallandaine*. In that case, it was ruled that persons receiving profits from betting systematically carried on by them throughout the year as book-makers on race courses, were chargeable with income-tax on such profits, even though bets were considered null and void and not recoverable in law. Denman, J., said that even an illegal vocation would be taxable on its income, as 'if a man were to make a systematic business of receiving stolen goods, and to do nothing else, and were thereby to make a profit of say £2,000 a year, the Income-tax Commissioner would be quite right in assessing him if it were in fact his vocation.' We hold accordingly that income derived from illegal *abwabs*, such as *uttarayan*, is not exempt from assessment."

CASE No. 2.

PATNA HIGH COURT CASE, NO. 74 OF 1919.

Miscellaneous Judicial Case.

In the matter of Bhikanpur Sugar Concern.

Income-tax Act (VII of 1918), sections 2 and 4.—Agricultural income—Sugar, manufacture and sale of—Liability to tax.

The question upon which the opinion of the High Court is sought is whether the Bhikanpur Sugar Concern is liable to pay income-tax in respect to that portion of.

its profits derived from the sale of the finished article in so far as it is manufactured from sugar-cane grown by its own servants on its own land, or whether it is exempted on the ground that such income is "agricultural income" within the meaning of sections 2 and 4 of the Act. By section 4 income of this nature is not chargeable to income-tax. By section 2 agricultural income is defined. By clause (*1*) (*b*) of that section agricultural income includes any income derived from (*i*) agriculture, or (*ii*) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market.

It is contended on behalf of the factory that the income derived from the sale of the finished product manufactured by them at their factory from the raw material grown upon their own land is covered by the words of section 2 (*1*) (*b*) which I have just quoted. In order to determine this question it is necessary to consider the circumstances under which the factory carries on its business. It is owned by a private company, the business being conducted under the direction of a Manager who is also a shareholder in the Company. It owns a sugar factory equipped with modern machinery by which the sugar-cane is converted into refined sugar ready for domestic purposes. It carries on business on a large scale. During the year of assessment 744,398 maunds of sugar-cane of which rather more than half was grown on the factory's own land passed through the mills, the remainder being purchased from cultivators of sugar-cane in the neighbourhood. The gross proceeds of this sugar-cane amounted to nearly 6 lakhs of rupees and that of molasses for the same period to about Rs. 44,000. The net profits for the year were stated to be Rs. 1,75,000 on which income-tax has been assessed at Rs. 10,937. The factory has lodged an objection in respect to Rs. 7,801 of this assessment as representing a tax on the profits derived from sugar-cane grown by themselves. From the accounts it appears that the agricultural branch which deals with the cultivation of the raw material and the factory branch are kept separate. It is not stated what the profits of the agricultural branch are but these would appear to be exempt from taxation. The process of manufacture adopted by the factory is similar to that employed by other sugar refineries in other parts of the world.

The main question for determination is whether the process of manufacture carried on by the Company can be said to be the performance by a cultivator of any process ordinarily employed by a cultivator to render the produce raised fit to be taken to market. In order to determine this it is necessary to enquire as to what are the processes ordinarily employed by cultivators of sugar-cane. It is common ground that the vast bulk of the sugar-cane in this country is cultivated by raiyats of agricultural villages. This they either sell in a raw state to middlemen or owners of factories or country mills or they reduce it by certain simple processes of crushing and boiling to a substance known as *rab*, a kind of molasses in a crude state, and then sell it to the factories where it is subjected to a further process of refinement in order to make it fit for domestic use as sugar. It is also not disputed that a very small fraction of the sugar-cane produced in this country is grown by the owners of factories themselves.

* * * * * *

I have stated enough to show that the processes employed by the factory are in kind as well as in degree vastly different from those ordinarily employed by a cultivator in order to render the produce fit for the market. Indeed the market to which the cultivator ordinarily takes his wares is not the same market as that in which the refined sugar manufactured by the factory is sold. The market of the vast majority of cultivators of sugar-cane is the sugar refinery itself or the country mill. The market of the sugar factory is the retail dealer of the finished product fit for domestic use, and in my opinion it is not possible to hold that the processes employed by a sugar factory in order to render it fit for their customers are those ordinarily employed by a cultivator to render it fit for his. It is true that the cultivator in some cases subjects the raw material to certain manufacturing processes resulting in the production of the juice or *rab* before disposing of it to his customers but even assuming that the performance of these processes by the cultivator would come within the meaning of section 2 (*1*) (*b*) (*ii*) the matter so far as he is concerned stops there and a great deal more has to be done by the factories to refine and crystallize the product before it is fit for the market with which they deal.

It was contended on behalf of the objector that the words "process ordinarily employed" have reference to the processes ordinarily employed by sugar factories or anyone else if they happen to be cultivators in rendering the produce fit for the market and that if a person is a cultivator and employs such processes in the ordinary course of his business he comes within the exemption created by the section. I do not think the section can be read in this sense. It refers to the performance by a cultivator of a process ordinarily employed by a cultivator which I think means in ordinary use amongst cultivators and not to a process ordinarily employed by any body else, and

had the meaning been that contended for, it is difficult to see what interpretation can be given to the words "by a cultivator or receiver of rent-in-kind."

It is next contended that as this is a taxing statute it should be strictly construed in favour of the subject and if there is any ambiguity in the meaning he should be allowed the benefit of the doubt. I do not think the construction of the section gives rise to any difficulty. The real question for determination is one of fact, *viz.*, whether the process employed by the factory is that in ordinary use by cultivators and in my opinion the evidence shows that it is clearly not.

It is further contended that the history of the assessment to taxation of the income of the Bhikanpur factory throws some light upon the intention of the legislature.

* * * * * *

I agree where there has been a long course of decisions determining the construction of a statute, this may be taken into consideration in construing a new enactment passed in the same terms as pre-existing statutes but a single decision such as that referred to cannot in my opinion form the basis of any presumption as to the intention of the legislature in the present case. Moreover, as is pointed out by Mr. McPherson in the order of reference, the word "factory" which appears in the proviso to sub-clause (*c*) of section 5 of the old Act has been omitted from section 2 (*1*) (*b*) (*iv*) of the present Act "presumably lest its presence might lend colour to any claim of the nature now under consideration."

It is further contended that the factory was never taxed before the year 1916-17 and for many years they have made an income from sugar.

* * * * * *

I do not think the fact that it has escaped taxation in the past is in itself a good reason why it should still escape unless it is in fact exempted by the Income-tax Act itself. In my opinion they are not exempted under the clauses of the Act relied on for the reasons above given and I would answer in the affirmative the question submitted to us whether the Bhikanpur Concern is liable to income-tax in respect to that portion of its produce which is derived from sugar-cane grown by its servants on its own land and in the negative the question whether it is exempted by reason of the provisions contained in section 2 (*1*) (*b*) (*ii*) of the Act.

A further point was taken by the learned Advocate-General on behalf of the Board of Revenue, *viz.*, that a company in the position of the Bhikanpur Concern cannot be said to be a cultivator within the meaning of section 2 of the Act. He pointed out that the Company really consisted of two distinct entities, one interested only in the production of sugar-cane and the other in the manufacture of refined sugar, and the accounts show that the factory branch really bought from the agricultural branch the raw sugar-cane at a fixed valuation of 7 annas per maund which was credited to the agricultural branch in the factory accounts and that in such circumstances the cultivation of the raw material was only ancillary to the manufacture of the finished product whereas in the case of a cultivator contemplated by the Act the process of manufacture, such as it is, is merely ancillary to the cultivation of the raw produce in order to make it fit for the market. In support of this contention the case of the Stamp Reference reported in I. L. R., 5 All. 360, was relied upon. That case dealt with the meaning of the term cultivator in the second schedule of the Stamp Act of 1879 and held that it did not include farmers, middlemen or lessees even though cultivation was to some extent carried on by them in the area covered by their lease but included only those persons who actually cultivated the soil themselves or by members of their household or by hired labour and with their own or hired stock. The question in that case was whether a kábuliyat executed by a lessee of certain land the greater portion of which was not cultivable or susceptible of being treated as a cultivator's holding was exempted from stamp duty under the Act of 1879. The Court found that although some small portion of the land might have been brought under cultivation by the lessee he was not a cultivator within the meaning of the Act having regard to the purposes for which the land was held. That case does not in my opinion support the contention of the learned Advocate-General in the present case. Having regard to the purposes for which the Company's land was used and the fact that they did cultivate it for their own purposes by their own servants, I think they must be held to be cultivators within the ordinary meaning of that term. But in so far as they were carrying on a business of sugar manufacturers I do not think that the processes used by them for that purpose were those ordinarily employed by cultivators for the purpose of rendering the produce fit to be taken to market. The truth is, in my opinion, that the Bhikanpur Concern was really acting in a dual capacity. In so far as they were cultivators of sugar-cane their operations ceased when they handed over the raw material to their factory branch. In so far as they were manufacturers of refined sugar they were carrying on a business which required the adoption of manufacturing processes not ordinarily used by cultivators before disposing of their produce in the market. In fact there is no evidence to show

that any other sugar factories of this nature convert into refined sugar produce grown on their own farms but even assuming that there may be a few isolated instances in which this is done it cannot in my opinion be said that this process of manufacture is one ordinarily employed by a cultivator.

CASE NO. 3.

BENGAL HIGH COURT CASE, NO. 83 OF 1920.

I. L. R., Vol. XLVIII, Calcntta, page 161.

Killing Valley Tea Company, Ld.

v.

The Secretary of State for India.

Indian Income-tax Act (VII of 1918), section 2 (*1*).—"Agricultnral income"—Tea, manufacture and sale of.

The question for determination is, whether the Killing Valley Tea Company are liable to be assessed on their annual profits under the Income-tax Act.

* * * * * *

It cannot be disputed that section 3, sub-section (*1*) makes the profits of the Company liable to assessment unless such profits constitute "agricultural income" within the meaning of section 4 read with section 2, clause (*1*). The income-tax authorities have held that the profits do not constitute agricultural income. The Company maintain the opposite conclusion. We are of opinion that both the contentions are erroneous.

The processes employed by the Company for the cultivation of tea bushes and manufacture of tea as a commercial commodity are thus described in their statement of case :

"After the tea bush has been planted and has arrived at a proper state of maturity, the young green leaf is selected and plucked by hand from the bush. It is then dried or withered and rolled, dried and stored. The actual dried and rolled leaf, the produco of the tea bush, is then sent to the market. In the very early days of tea cultivation, the green leaf was dried or withered in the sun and was then rolled by hand. This primitive method was replaced by machinery. The effect of these processes being carried out by machinery in no way alters the processes or affects the result. It only leads to a quicker manipulation of the leaf. The types of machinery at present in use are those which have been in use for the past fifty years, or thereabouts. The actual leaf of the tea plant, without the addition thereto of the processes above described, is of no value as a market commodity."

The counter-statement on behalf of the Crown is expressed in the following terms : "It is contended on behalf of Government that the manufacturing processes carried out in a modern tea factory, with scientific appliances and up-to-date machinery, are different from those ordinarily employed by a cultivator to render the produce raised by him fit to be taken to market. In former times, the process of manufacturing tea was very simple and primitive. The leaf was rolled by hand and was then 'fired' in an iron pan over an open fire. It is understood that this method was introduced from China, where it was the ordinary method employed by the cultivators in making tea. The process employed in a modern tea factory goes far beyond this. The factory is driven by steam or electrical power throughout; the tea is first withered; it is then passed through a machine which rolls it and is left for a short time to ferment, this process being repeated two or three times; it is then placed in another machine where it is 'fired' by means of hot air from a furnace which is forced through by mechanically driven fans; and finally, it is sorted into grades by machinery and packed for export or sale in the Calcutta market. It is snbmitted on behalf of Government that this process is different from the method described above by which the Chinese cultivator prepared his tea for market and which was the original method of tea-making in India. The present day method is a process of manufacture and not merely a process ordinarily employed by a cultivator to render the produce raised by him fit to be taken to market."

It appears to us to be clear from the respective cases just set out that the process in its entirety cannot be appropriately described as agriculture. The earlier part of the operation when the tea bush is planted and the young green leaf is selected and plucked may well be deemed to be agriculture. But the latter part of the process is really manufacture of tea, and cannot, without violence to language, be described as agriculture. Counsel for the Company appreciated this difficulty and made an endeavour to bring the case under the second clause of the definition. That clause, in onr opinion, cannot be applied to the case before us. The manufacture of tea as a marketable commodity from the green leaves cannot be held to be the performance by a cnltivator of a process

ordinarily employed by a cultivator to render the produce raised by him fit to be taken to market. The assertion of the Company that the actual leaf of the tea plant is of no value as a marketable commodity must be taken with a qualification. The green leaf is not a marketable commodity for immediate use as an article of food, but it is a marketable commodity to be manufactured by people who possess the requisite machinery into tea fit for human consumption. We must further observe, in view of the expression used in the definition, that the manufacturing process cannot properly be said to be employed to render the tea leaves *fit to be taken into the market*. The means employed for the cultivation and manufacture of tea are well known and are succinctly stated in an article on tea by Mr. John McEwan in Volume 26 of the Eleventh Edition of the Encyclopædia Britannica; they are described in fuller detail in the standard works on cultivation and manufacture of tea by Lieutenant-Colonels E. Money and David Crole. There can be no doubt, in our opinion, that the entire process is a combination of agriculture and manufacture.

The principle applicable to cases of this character is now well settled. In the case of *Inland Revenue Commissioners* v. *Ransom* (1), the respondents, who were a limited company carrying on business as manufacturing chemists and growers of medicinal and other herbs, owned a factory where the manufacture and distillation of herbs were carried on, and they also occupied a farm on which they grew herbs for treatment in the factory. The respondents were assessed to excess profits duty. On appeal by them against the assessment, it was ruled that the occupation of the farm was the business of husbandry and that the profits of the farm should consequently be excluded for the purpose of excess profits duty under section 39 of the Finance Act, 1915, so that what remained as the profits of the factory could alone be assessed. This view was supported by reference to the dictum of Lord Parker in Mitchell *v.* Egyptian Hotels (1), that there was no reason why a corporation, any less than an individual, should not be engaged in more than one trade or business at the same time. The same question of apportionment arose in Commissioners of Inland Revenue *v.* Maxse (2), where the Court of Appeal reversed the decision of Sankey, J., in Inland Revenue Commissioners *v.* Maxse (3), and ruled that the proper course when a trade or business liable to duty is carried on in connection with a trade or business not so liable, is to sever the profits of the two businesses and assess accordingly. The appellant was the sole Proprietor, Editor, and Publisher of the *National Review* and was assessed on the profits of this publication. The General Commissioners held that the appellant was exempt from the duty, as he was the Chief Contributor to the review, and thus carried on the profession of a journalist, the profits of which depended mainly on his personal qualifications within the meaning of section 39 (c) of the Finance Act, 1915. On appeal, Sankey, J., set aside the order for exemption as, in his opinion, the appellant was not in the position of an ordinary journalist receiving remuneration for articles contributed to the press, but derived his profits from the sale of a commodity, thereby carrying on an ordinary commercial business. The Court of Appeal reversed this decision and directed that the profits should be apportioned, even though the apportionment might be a difficult operation. The truth was, as Warrington, L.J., pointed out, that the profits were derived from two businesses, one of which was a profession exempt from duty, while the other was not so exempt and was assessable with duty. See also *In re Bhikanpur Sugar Concern* (*1*). The Legislature had obviously this class of cases in view, as is clear from the provisions of section 43, sub-section (*2*), which embodies the following rule :—

"Without prejudice to the generality of the foregoing power (that is, power to make rules for carrying out the purposes of the Act and for the ascertainment and determination of any class of income), such rules may, when income is derived in part from agriculture and in part from business, prescribe the manner, whether with deference to a class or in particular cases, by which the taxable income shall be arrived at."

No rules, such as would be applicable to the case before us, have yet been framed. When they are framed and operate as statutory rules, an assessment may be made on such portion of the profits of the Company as do not fall within the description "agricultural income."

But although we hold that the profits of the Company are not entirely exempt from assessment, it is plain that the assessment which has actually been made cannot be sustained, as it stands; for that assessment is in excess of the sum which may be lawfully levied, and the extent of the excess is yet unknown, see the observations of Swinfen Eady, M.R., in *Commissioner of Inland Revenue* v. *Maxse* (*2*).

Great stress has naturally been laid by Sir Binod Mitter, who appeared on behalf of the Company, on the important fact that no attempt was ever made to assess the Company to income-tax under the corresponding provisions of the Indian Income-tax Act (1886), which have been, so far as the present question is concerned, reproduced with no substantial variation in the Indian Income-tax Act (1918). This is no doubt a circumstance to be taken into consideration, for an interpretation which has long been acted on will not be disregarded by a Court of Law.

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and the Court should have regard to the construction put upon a statute when it first came into force : * * * * But * * * where the Court is called upon to construe an Act of Parliament expressed in unambiguous language, it ought to put its own construction upon it, regardless of the construction that has been commonly put upon it; the fact that a mistaken interpretation has been generally put upon it cannot alter the law. To the same effect are the observations in Baleswar *v.* Bhagirathi * "It is a well settled principle of interpretation that Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means a controlling effect upon the Courts; such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and, in a clear case of error, a Court would without hesitation refuse to follow such construction."

* * * * * *

We may add that it was stated by the Advocate-General that there has been some divergence of opinion among successive legal advisers of the Crown and that the assessment has been made in this instance with a view to obtain a judicial determination of the true meaning of the legislative provisions on the subject. Clearly we cannot, in such circumstances, allow our decision to be controlled by the conduct of the Revenue Authorities in the past. We have finally been pressed to apply the elementary rule that taxing statutes must be construed strictly :

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Now, there is no room for controversy that the Crown seeking to recover the tax must bring the subject within the letter of the law, otherwise the subject is free, however much within the spirit of the law the case might appear to be. There can be no equitable construction admissible in a fiscal statute; the benefit of the doubt is the right of the subject :

* * * * * *

Bearing all these principles in mind, we hold that the Company must be taxed to the limited extent indicated, because they come within the letter of the law to that extent.

CASE No. 4.

MADRAS HIGH COURT, CASE NO. 4 OF 1919.

I. L. R., Vol. XLIII, Madras, page 75.

Board of Revenue, Madras, Petitioner,

v.

Ramanadhan Chetty, Minor, by Guardian, Velliamma Achi, Respondent.

Income-tax Act (VII of 1918), sections 3 and 9.—Foreign income—Liability to tax—Income not received in British India.

The officiating Chief Justice : * * * This is a case stated by the Board of Revenue, under section 51 of the Income-tax Act, VII of 1918, in which the question involved is whether the assessee, a Nattukottai Chetti, who is the proprietor of a money-lending business carried on his behalf by his agents in various places including Saigon, Sodae and Khando situated in French Cochin-China, is liable to be taxed, under the provisions of this Act, in respect of the income of the business though not received in British India.

The learned Advocate-General on behalf of the Crown has based his contention on two grounds : firstly, that the income in question accrued or arose to the assessee in British India inasmuch as he was entitled to call upon his agents to pay the income to him in British India, and, secondly, that * * * the business the income of which is sought to be taxed must be held to have been carried on in British India and, therefore, the income of that business is taxable.

It will be convenient to dispose of the last contention first. The facts in this connection as submitted are as follows :—The entire business operations producing the income are conducted at the places above mentioned outside British India by agents appointed for fixed periods who use their own discretion in lending money to customers. The only part taken by the proprietor in connection with the business is to acquaint himself with the state of the business abroad and occasionally to issue general instructions. It is impossible for us, on these facts, to hold that the business is one carried on in British India.

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The business here is that of money lending and the mode of carrying it on is left entirely to the discretion of the agents in the places where the lending operations are conducted. The mere issuing of general instructions occasionally by the proprietor in British India and the fact of his being supplied with information from time to time as to the state of the business would not at all bring the case within the purview of the ruling referred to. As in no sense, in my opinion, could the business in this case be said to be managed and controlled by the proprietor in British India, the statement of Lord Loreburn in De Beers Consolidated Mines, Limited *versus* Howe (1906) App. Cas. p. 455 "that the real business is carried on where the Central Management and Control actually abides" has no application. On the other hand, the observations of the Privy Council in Lovell and Christmas, Limited *versus* Commissioner of Taxes (1908) App. Cas. p. 46 at p. 51 apply rather closely to the facts of the case. Their Lordships observe, "One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income-tax Acts, so as to render the profits liable to income-tax." It is, therefore, unnecessary to express an opinion on the question whether the income of a business controlled and managed by a person residing in British India, although the actual operations giving rise to the income are carried on, as in this case, outside British India, would be assessable to income-tax.

At one time the Advocate-General seemed even to argue that it is section 9 (*1*) by which the tax payable on account of income derived from business is to be determined. All that it says is, "that the tax shall be payable by the assessee under the head 'Income derived from business' in respect of the profits of any business carried on by him," and the rest of the section deals with the mode in which such profits shall be computed. If section 9 (*1*) be taken to furnish the whole test, then section 3 (*1*) would have to be excluded from consideration in dealing with the income derived from business. But the Advocate-General was not really prepared to go so far; at any rate, there can be no doubt that section 9 (*1*) must be read along with section 3 (*1*) and that it is the latter that lays down the test to be applied in determining all incomes assessable to the tax including income derived from business. If a certain income derived from business cannot be said to accrue or arise or to be received in British India, that income would not be assessable by virtue of anything contained in section 9. In fact the main argument in this connection has been that the income of a business, which is managed and controlled by the proprietor in British India, accrues or arises in British India within the intendment of law, and because it so accrues or arises, is taxable.

The first part of the argument does not really present any difficulty, for the language of section 3 seems to be unambiguous. The tax is leviable with reference to the place where the income accrues or arises or is received and not with reference to the residence of the person who is entitled to the income. This seems to be the entire scheme of the Act and sections 31 and 33 would appear to be illustrations of that principle. Whatever meaning be attached to the words "accrue" or "arise" or such as "grows" or "becomes due or payable," it is impossible to hold that the income in this case could be said to have accrued or arisen in British India. If loans are made and the borrowers reside outside Britisb India and if accounts are adjusted, the moneys lent are realised with profit or are capable of being realised and the profits are periodically ascertained and dealt with outside British India, it is impossible to hold that the income of such business accrued or arose in British India.

A number of English decisions were discussed before us, but it is unnecessary to deal with them in any detail, because the English Statute under consideration in those cases differs in many material respects from the Indian Act. In the English Statute the place of residence of a person is a basis of assessment but is not so as pointed out above in Act VII of 1918.

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Then the learned Advocate-General at one stage of his argument seemed to contend that the income sought to be assessed should be deemed to accrue or arise or to be received in British India under the provisions of this Act, but this argument is clearly untenable. In the first place this phrase refers to cases set out in the Act itself (see for instance sections 6 (*2*) and 8 and none of them have any application to the case under consideration, and in the second place as I have shown there is no general rule of law by virtue of which the income sought to be assessed could be said to accrue or arise in British India.

If we look at the history of this enactment, the case sought to be made on behalf of the Crown appears to be still more untenable. * * * the Advocate-General himself has informed us that, at least before 1915 or 1916 when he was

consulted with respect to certain cases of a nature similar to this, the general practice of the Revenue Department was not to assess income of business carried on outside British India but the proprietor or proprietors of which resided in British India. We are justified in assuming that the legislature was aware of this practice, and if with that knowledge they repeated in the new enactment the same words on which the practice of the Government was founded, it gives rise to the presumption that they did not want to assess such incomes. If the legislature intended to assess these incomes, and it would have been a very substantial source of public revenue, they could have easily said, as in the English statute, that income accruing *to* a *person* in British India from any business wherever carried on is liable to be assessed.

I would hold, therefore, that the income of the business under reference is not liable to be assessed under the provisions of Act VII of 1918.

* * * * * *

Oldfield, J.: * * * * * Respondent has in the French Territory of Saigon a money-lending business conducted by an agent, and (according to the statement in his petition, which is adopted in the case submitted to us) keeps himself acquainted with its progress and occasionally issues general instructions. He, however, resides in this Presidency and *receives no income from Saigon*. On these facts is he liable for tax on the profits of this business or, as he contends, will he be so, only if and when the profits are remitted to him here?

I agree with the learned Chief Justice that the answer to the first of these questions must be in the negative; and to justify that conclusion I refer to the scheme of the Income-tax Act of 1918, under which the case has to be decided.

* * * * * *

The point is at present that section 3 (*1*) affords a comprehensive definition of income for the purpose of the Act and that this definition is to be regarded as controlling, not as enlarged by the language subsequently used in classifying the different descriptions of such income and prescribing the method of assessment for each.

* * * * * *

The primary meaning given for the word in the Oxford Dictionary is "to arise or spring as a natural growth or result;" in Webster's Dictionary, "to come by way of increase," and in Wharton's Law Lexicon, "to grow to or arise." These, the only authorities referred to, show that the origin of the thing, which accrues, in the exertions of some person or otherwise, is not an essential element in the definition of the word "accrue" and cannot affect its application. This is fatal to the attempt made in the first form of the argument to identify the place of accrual referred to in section 3 (*1*) with the place in which such exertions, in the present case by carrying on business, have taken place. I, however, refer at once to sections 10 (*3*), 31 and 33 of the Act, in the light of which it is contended that section 3 (*1*) should be construed. It might be sufficient to say that the first in which a very definite exception is specified, and the others occurring in a chapter headed "Liability in special cases," cannot be invoked as exemplifying any general principle or controlling a general definition. But in fact the sole similarity between the cases dealt with in these provisions and the case before us is that all relate to profits earned where they are not enjoyed. The special provision in section 10 (*3*) for liability to assessment in British India of professional fees, which a resident there has received elsewhere, can be referred to no general foundation and is merely the recognition of a presumption of law that the earnings of a resident in British India will be brought there for enjoyment, whilst sections 31 and 33 (of which the former statedly deals only with income chargeable under the Act) are easily intelligible provisions for the liability to the tax of the person, through whose hands in one capacity or another the profits in question will pass in British India and whom therefore the Crown can reach in order to collect it. It may on the other hand be observed that the existence of special and exploit provision in section 10 (*3*) for the taxation of the one kind of income not received in British India is strong reason for refusing to hold others liable by implication. The argument of the learned Advocate-General in the first form is accordingly unsustainable with reference either to the significance of the word "accrue" or to any construction of section 3 (*1*) with reference to other parts of the Act: and it must be rejected.

His argument in its second form derives at first sight some support from the secondary meanings of "accrue" given in the Century Dictionary as used in law for "to become a present and enforceable right" and in Bouvier's Law Lexicon as "to become a present right of demand," the suggestion being that respondent's profits in Saigon accrued to him in British India, when, being in the latter place, he had a right to demand them of his agent in the former; and to show that income is regarded in the Act as accruing, before it is received and when there is only a right to receive it, reference has been made to the use of the word "receivable" in section 7. There is, however, a short answer

to this. Firstly, this meaning of "accrue" is excluded by the context in section 3 (*1*). For it is not the right to demand the profits, which it is proposed to tax, but the profits themselves. And secondly, if the word "receivable" in section 7 is interpreted in the light of the provision in section 15 (*3*) for the method of payment of the tax on interest on securities. the description of income with which section 7 deals, its use will be seen to involve recognition, not of any kind of income as existing independently of and before its receipt, but of income to which liability for the tax attaches at the moment of its receipt, when the tax is to be deducted by the person responsible for its disbursement.

Some attempt has been made to support this argument by reference to English decisions. But it is useless to deal with them at length in view of the material differences between the wording of the Act before us and that of the English statute in question.

CASE No. 5.

MADRAS HIGH COURT, CASE NO. 4 OF 1921.

I. L. R., Vol. XLIV, Madras, page 773.

The Chief Commissioner of Income-tax, Madras (Referring Officer)

v.

Bhanjee Ramjee and Co. (Assessee).

Indian Income-tax Act (VII of 1918), sections 3 and 33 (*1*).—Non-residents, business connection in British India.

"Now the income which is taxable under the Act is, as provided in section 3,—

All income from whatsoever source it is derived if it accrues or arises or is received in British India or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India."

And under section 33 (*1*), in the case of any person residing out of British India,—

"All profits or gains accruing or arising to such person whether directly or indirectly through or from any business connexion in British India shall be deemed to be income accruing or arising in British India."

And is consequently taxable under the express provisions of section 3. It makes no difference with regard to this section whether the non-resident entitled to the income is a British subject or a foreigner; in either case he is chargeable with the tax in British India. It has, however, been argued that because section 33 (*1*) not only provides that such profits and gains shall be deemed to be income accruing or arising within British India, but goes on to provide that they "shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be the assessee in respect of such income-tax," the profits and gains in question are not chargeable unless they are assessed to income-tax in the name of an agent of the non-resident. This construction is not supported by the proviso immediately following :—

"Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person, which are or may at any time come within British India," which supports the construction that the profits or gains are chargeable if they can be got at in British India whether they are assessed in the name of an agent of the non-resident or not. This was expressly decided on the corresponding section of the English Act by Mathew and A. L. Smith, JJ., in *Tischler* v. *Apthorpe* (1), which was approved by the Court of Appeal in *Werle & Co.* v. *Colquhoun* (1), and it was held that a non-resident, who had been himself assessed whilst in England, had been properly assessed. All that the latter part of the section does is to provide machinery by which the tax can be levied where the non-resident cannot himself be got at.

In the present case, the petitioner resides and has his principal place of business in the Cochin State in Mattancherri, which adjoins British Cochin and practically forms one town with it, and the petitioner not only does a large part of his business in British Cochin as stated in the reference, but also accepted notices and submitted the necessary returns to the Collector of Malabar, of which British Cochin forms a part for income-tax purposes. The reference states that "Contracts for the supply of goods are entered into and signed at the offices of firms in British Cochin and the goods are delivered at the jetties of the purchasers : the sale-proceeds are paid to the firm's agent or other duly authorized servant in cash in British India or by cheques, which are cashed in Banks in British India."

In these circumstances, it seems clear that these are profits and gains arising to the petitioner through or from his business connexions in British India in respect of which he is assessable under the Act.

CASE No 6.

PATNA HIGH COURT, CASE NO. 102 OF 1920.

Patna Law Journal, Vol. VI, page 62.

In the matter of Raja Jyoti Prasad Singh Deo of Kashipur in the District of Manbhum.

Income-tax Act (VII of 1918), sections 5, 9, 11.—Mining rents and royaltics.

Dawson Miller, C. J.

This case comes before us on a reference by the Board of Revenue under section 51 of the Indian Income-tax Act, 1918. The reference was made upon the petition of Raja Jyoti Prashad Singh Deo of Kashipur, whose taxable income has been assessed by the Deputy Collector including a sum of Rs. 1,70,706 the amount derived by him from rents and royaltics of certain collieries. Road cess and Public Works cess amounting to Rs. 10,669 have also been levied on these rents and royalties under the Cess Act. The petitioner claims that this amount should be deducted in assessing his taxable income derived from the source named. The question submitted for our determination is whether the full amount of the rents and royalties received is subject to income-tax, or whether, as the petitioner contends, the amount paid in respect of cesses should be deducted in ascertaining the taxable income. Section 5 of the Income-tax Act enumerates the classes of income which shall be chargeable to income-tax. They are (*i*) salaries, (*ii*) interest on securities, (*iii*) income derived from house property, (*iv*) income derived from business, (*v*) professional earnings, and (*vi*) income dorived from other sources. With regard to cach of these sources of income, the Act provides how the taxable income shall be arrived at and what allowances shall be taken into account in determining the amount to bo taxed. For the purposes of this case it is only necessary to refer to the provisions made with regard to class (*iv*) "income derived from business" and class (*vi*) "income derived from other sources" as it is under one or other of these heads that the income in question falls. In my opinion the income in question falls under class (*vi*) but as the petitioner's first contention is that it falls under class (*iv*) it is desirable to refer to the sections of the Act which deal with both these classes. Income derived from business is dealt with in section 9 of the Act, which provides that the tax shall be payable by an assessee under the head "income derived from business" in respect of *the profits* of any business carried on by him. It then sets out the allowances which may be deducted in computing the profits. These include any rent paid for tho premises in which the business is carried on, repairs to the premises, interest on capital borrowed for the purposes of business, premiums paid for insurance on the buildings, machinery or plant and repairs to the same, certain sums for depreciation and renewals, sums paid on account of land revenue, local rates or Municipal taxes in respect to the premises, and lastly any expenditure (not being in the nature of capital expenditurо) incurred solely for the purpose of earning such profits.

Section 11 deals with income derived from other sources and provides (1) "The tax shall be payable by an assessee under the head income derived from other sources in respect of income and profits of every kind and from every source to which this Act applies (if not included under any of the preceding heads) with the exception of agricultural income, (2) such income and profits shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making such income or earning such profits, provided that no allowance shall be made on account of any personal expenses of the assessee.

Thc petitioner contends in the first place that the income derived from rents and royalties is income derived from business and that it is only the profits arising from such business that are taxable and the profits can only be arrived at after deducting expenses such as cesses and other expenses chargeable to revenue account which he is bound to pay. He admits that the deductions now claimed are not included amongst those which are prescribed in section 9 of the Act although that section does provide for the deduction of an allowance in respect of land revenue, local rates or Municipal taxes in respect of business premises. If it is legitimate to draw any inference from the inclusion of local rates and Mnnicipal taxes amongst the allowances permissible under the Act the inference would point to the conclusion that it was the intention of the legislature to exclude cesses and similar charges other than those mentioned in the section. In fact if the petitioner's contention be correct that he is entitled in determining the taxable profits to exclude all expenditure chargeable to revenue account it would have been unnecessary for the legislature expressly to include land revenue amongst the allowances to be taken into account in computing the taxable profits. The petitioner contends, however, that the allowances mentioned in section 9 and indeed in the other sections dealing with the tax payable are not exhaustive, and that it is only the profits of the business which can be taxed. Al-

though in the view I take upon the first point raised by the petitioner it is not necessary definitely to decide this question, I am of opinion that this branch of his argument cannot be supported. If in assessing the taxable income cesses must first be deducted it would seem to follow that in determining the amount of cess payable under the Cess Act upon the "annual net profits" derived from similar property the amount of income-tax should first be deducted, but it was held in Manindra Chandra Nandi *v.* Secretary of State for India (I. L. R., 34 Cal. 257) that an owner of mines is liable to pay both income-tax and road cess tax on the same net profits derived, or royalty received, by him from the mines. That case in so far as it dealt with the liability to pay cesses was affirmed by the Judicial Committee of the Privy Council (see L. R. 38; L. R. 31; s. c. I.L.R., 38 Cal. 372). No case has been called to our attention in which taxes imposed by statute unless specially provided for in the Act have been deducted in computing the amount payable either for cess or income-tax, but as in my opinion the income derived from rents and royalties of collieries does not come under the head of income derived from business it is unnecessary definitely to determine this point. It seems to me that the income in question is no more income derived from business than is the income derived from the lease of house property or land used for the purpose of carrying on business. The royalties received in the present case do not depend upon the profits earned by the lessees of the mine, but upon the quantity of coal raised and the royalty will be payable whether the lessees make a profit or not and section 9 has no application to the present case.

I am of opinion that the case falls under section 11 which refers to income derived from other sources. The petitioner contends in the second place that even if this is so the cess should be deducted from the taxable income. His argument based upon this section is two-fold. In the first place he points out that the section refers to both income and profits, that income may comprehend something wider than profits, but that the royalties in question are profits and can only be ascertained after deducting all out-goings necessarily incurred not only for the purpose of earning the profits, but charged thereon by statute to revenue account. It is true that the section relates to both income and profits. The section, however, is dealing with various kinds of income and includes all those not specially mentioned in the first five classes referred to in section 5 and it is quite conceivable that the word "profits" would be a more apt term than the word "income" to describe some of the cases included. But I can see no reason why royalties received from mines should be regarded as anything other than income in the ordinary sense. There is no definition of the word income in the Act itself, but its meaning as there used can I think be determined with sufficient accuracy from a perusal of the Act. Without giving an exhaustive definition it may be described as the annual or periodical yield in money or reducible to a money value arising from the use of real or personal property or from labour or services rendered, bearing in mind that in some cases, *e.g.*, income derived from house property the yield must be taken as the *bonâ fide* annual value and not necessarily as the actual yield. Investments and rents derived from houses and land are instances of income arising from the use of property whilst salary, wages and professional earnings including pensions are instances of income arising from labour or services rendered. Income derived from business may, in certain cases, be a combination of both classes. It is not, however, the gross income so derived that is in all cases the taxable income. Certain allowances from the gross income are provided for by the Act and certain classes of income are exempt, but unless the exemptions or allowances are provided for by the Act there would appear to be no ground for holding that such are permissible. In the present case the only allowance provided for in section 11 is any expenditure not being in the nature of capital expenditure, incurred solely for the purpose of making such income or earning such profits. As a last resort the petitioner contends that the amount levied for cesses is an expenditure incurred solely for the purpose of making the income, but it would, in my opinion, be an undue straining of plain language to say that the payment of road-cess is an expenditure incurred solely for that purpose. The liability to pay cesses results from the income having been made, and the payment of the cess can hardly be said to form a necessary part in the making of the income, which must come into existence before the liability to cess arises. The payment of cess is a necessary expense arising in connection with the ownership of royalties but it is in no sense an expenditure incurred for any purpose incidental to the making of the income.

In my opinion the question submitted for decision to the High Court, *viz.*, whether payments made by the petitioner on account of the local cess are to be deducted before his income is assessed to income-tax under section 11 of the Income-tax Act must be answered in the negative. The petitioner will bear the costs of this reference.

Mullick, J. * * * * * * *

In my opinion clause 2 of section 11 is exhaustive and no rates or taxes of which the basis of calculation is net profits after such profits have been earned can be deducted in

making the computation. A comparison of clause 2 (*ix*) of section 9 the wording of which is identical with clause 2 of section 11 would seem to make it clear that expenditure incurred for the purpose of earning income or profits means sums paid or liabilities incurred, the purpose of which is to feed the spring from which the income is derived. The expenditure must be incurred as a condition precedent to the production of the income. The payment of a tax which is conditional on the making of an income and which is to be calculated on the amount of such income after it has come into existence cannot be said to be expenditure for the making of such income. For our present purposes the term net profits as used in the Cess Act is synonymous with the term income as used in the Income-tax Act.

In the next place even if payment of road and public works cesses could be called expenditure for the purpose of earning the income, it is clear that it is not expenditure incurred solely for such purpose. In so far as the State in return for the payment of the cesses grants *inter-alia* to the assessee security for the enjoyment of his income the payment may be said to some extent to be made for the purpose of earning such income, but it cannot be said to be made solely for such purpose. It is for this reason that land revenue, local rates and municipal taxes do not come under the exception provided in clause 2 (*ix*) of section 9 and special provision has been made for them in clause 2 (*viii*). No special provision has been made in respect of road and public works cesses and if the royalty receiver had been a person carrying on a business, he could not have claimed a deduction for them.

The same principle must apply to the case of an assessee whose income has to be computed under section 11, and these cesses cannot be deducted in his case also. A tax leviable as a condition precedent to the creation of the source of income, such as a license fee, would stand on a different footing, but that is not the case here. I agree, therefore, with the view taken by the learned Chief Justice.

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Bucknill, J. * * * * * * *

I agree generally. Cesses under the Cess Act, 1880, are admittedly leviable upon royalties received from the working of mines (see section 72), royalty received from mines is "income derived from other sources" section 5 (*vi*) Income-tax Act, 1918, and not "income derived from business." Such royalty is liable in respect of both income-tax and road-cess and public works cess.

In considering what is the income derived from business the word *income* means "profits of the business" (see section 9 (*1*). How these profits are to be arrived at, section 9 (*2*) shows, and there are many deductions which may rightly be made from what may be called the "gross receipts" before the figure of the profits properly assessable for income-tax is arrived at. But in the case of "income derived from other sources" the only abatement contemplated is the broad one expressed thus in sub-section (*2*) "such income and profits shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making such income or earning such profits." In this reference this is clearly a case concerning "income" and not "profits." But even if royalty derived from mines could be regarded as falling within the phrase "income derived from business" under section 5 (*iv*), it does not appear that road or public works cess could be regarded as sums paid on account of land revenue, local rates or municipal taxes as contemplated under section 9 (*2*) as being capable of being deducted from gross receipts in order to arrive at the properly assessable profits which is the synonym for "income derived from business" as designed in section 5 (*iv*).

It is most difficult to see how in the case of "income derived from other sources" the assessment of which is regulated by section 11 and in which the abatement possible in arriving at the taxable income and profits is confined to a deduction of "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making such income or earning such profits" it can be argued that "road or public works cesses" are *expenditure* incurred *at all* for the *purpose* of making income or earning profits.

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In my view the royalty receiver is liable to be assessed (*a*) for income-tax, (*b*) for road and public works cess on the same sum, namely, the royalty payable to the royalty receiver by the lessees of the mines.

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CASE No. 7.

MADRAS HIGH COURT, REFERRED CASE NO. 11 OF 1920.

I. L. R., Vol. XLIV, Madras, page 489.

The Chief Commissioner of Income-tax, Madras

v.

The Eastern Extension Australasia and China Telegraph Co., Ltd.

Income-tax Act (VII of 1918).—Non-residents, computation of income, income-tax and excess profits duty paid in England, not a permissible deduction.

The Chief Justice.—This reference raises questions as to the interpretation of a rule made by the Government of Madras under section 43 (*2*) (*c*) of the Indian Income-tax Act which enables it to "prescribe the manner in which and the mode by which the taxable income of persons not resident in British India or of persons deemed to be assessees in respect thereof, shall be arrived at." Such persons under section 33 are made liable to be taxed on profits or gains which are deemed to arise or accrue in India. Rule 1 provides that the profits in India for assessment purposes may be calculated on such percentage of the turnover of the business in India as the Collector may consider reasonable. Rule 2 with which we are concerned is as follows: "In cases in which the method of assessment on a percentage of turnover is inapplicable as for example—the case of an Indian Branch of a Foreign Insurance Company—the profits of the Indian Branch may be assumed for income-tax purposes to bear the same proportion to the total profits of the Company as its receipts bear to the total receipts." The question referred to us is whether or not in arriving at the "total profits" for the purposes of the rule Income-tax and Excess Profits Duty payable in England and income-tax payable at stations outside British India are to be deducted. Mr. Aingar for the appellant has referred us to *Stevens* v. *Durban Roodepart Gold Mining Company*, 100 L. T. 481, and to *certain dicta Scottish, etc., Insurance Company* v. *New Zealand Land Company, 89 L. J. P. C. 220, and Rover* v. *South African Breweries, 1918, 2 Ch. 233*, which support the proposition that in England when profits arising abroad are liable under the English Income-tax Act to pay income-tax in England, a deduction is allowed in respect of the income or similar tax levied on such profits in the places where they arose; and if it were a question here of taxing under section 5 (*1*) of the Act profits arising outside British India on the ground that they were received in British India, those authorities would be applicable, but in my opinion they have no application to the present case. What have to be ascertained are the assessable profits arising in British India of the Eastern Extension Australasia and China Telegraph Company which is incorporated in England and has branches in India and elsewhere. But for the rule in question those profits would be ascertained by taking the Indian receipts and debiting against them the expenditure necessary to earn them, and in such a calculation the amount of the tax itself would not be allowed as a deduction. The taxes levied locally on the assessable profits arising in other countries would not enter into the calculation at all. As, however, it would be difficult if not impracticable in the case of a business such as this to ascertain the expenditure properly debitable against the Indian receipts, the Government in the exercise of its statutory powers has provided that the assessable profits of the Indian branch without deduction of the Indian income-tax shall be deemed to bear the same proportion to the total assessable profits of the Company as the Indian receipts bear to the total receipts. As the Indian assessable profits are to be ascertained without deduction of the local income-tax, it must necessarily be the intention of the rule that the total assessable profits of the business should be arrived at in the same way, viz., without the deduction of the several local income-taxes and excess profits taxes which are enhanced income-taxes. Otherwise the whole basis of comparison would be gone; and as observed in paragraph 5 of the order of reference, the opposite constructions would involve holding that the word "profits" was used in two different senses in the same rule. The answer to the reference must be that the deductions claimed are not allowable. * * * * * *

Oldfield, J. * * * * It is impossible in accordance with the ordinary canons of construction to give to the word "profits" a different meaning in the two places in which it occurs; and, as where it occurs first it is used statedly of profits on which the tax has to be ascertained, that is of profits before they have been taxed; it must be similarly used where it occurs again and where its meaning is disputed. This entails acceptance of the argument for the Crown and, as it is not disputed that foreign super-tax and income-tax stand on the same footing, an answer to the reference is that deductions claimed are inadmissible.

Kumarswamy Sastriar, J. * * * * The total profits of the company will be the profits made in British India and also outside British India and so far as

the profits made in India are concerned, it is clear that income-tax paid during the previous year or likely to be assessed during the current year cannot be deducted. Section 9 of the Act which relates to income derived from business and which provides for the mode by which such income shall be computed specifies the deductions that can legally be made and it is clear that income-tax paid for the previous year cannot be deducted to arrive at an estimate of the profits on which income-tax is to be assessed.

In Ashton Gas Company *v.* Attorney General, 1906, A. C. P. 10, Lord Halsbury observed : "Now the profit upon which the income-tax is charged is what is left after you have paid all the necessary expenses to earn the profit. Profit is a plain English word, that is what is charged with income-tax. But if you confound what is the necessary expenditure to earn that profit with the income-tax which is a part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel at such very considerable length to point out that this is not a charge on the profits at all. The answer is that it is. The income-tax is a charge on the profits; the thing that is charged is the profit that is made and you must ascertain what is the profit that is to be made before you deduct the tax. You have no right to deduct the income-tax before you ascertain what the profit really is." These observations have to be kept in mind in construing the word "profit" in the rule.

The rule in question merely provides the formula for ascertaining the income arising out of the business in British India which is so mixed up with the income arising out of business carried on outside British India that you cannot estimate it with mathematical accuracy. By the very nature of the case the rule is artificial and provides a rough and ready method of arriving at a taxable income. As there can be no deduction of the income-tax in arriving at the Indian assessable profits if the Indian income were attempted to be arrived at in the usual way, namely by taking the Indian receipts and deducting the expenditure necessary for the carrying on of the Indian business having regard to the provisions of section 9 of the Income-tax Act, it seems to me that the word "profit" cannot be used in two senses in the rule so as to exclude income-tax where one item of the total, namely, Indian income is concerned and to include it as regards other items.

* * * * * *

There can be little doubt that as a matter of accountancy and book-keeping and as between share-holders entitled to a dividend and the company income-tax paid is always entered as an expense which has to be deducted before the amount divisible as profits can be ascertained and enters into the debit charges in the same way as any other item of expenditure. It is equally clear that for purposes of levying income-tax you cannot deduct the amount paid or payable as income-tax on the grounds that it is only what remains that goes to the persons carrying on the business. The fact that as between the share-holders and the company you would estimate profits in a particular way is no ground for estimating profits on which income-tax has to be calculated in a similar manner.

In enacting the rule in question for the purpose of ascertaining profits in India, I am of opinion that what was intended was that you must take the profits in each centre on which income-tax was charged or chargeable, total up such profits and estimate the profits in British India by ascertaining the ratio which the total receipts in India bear to the total receipts.

I would answer the question in the negative.

CASE No. 8.

BENGAL HIGH COURT, CASE NO. 56 OF 1921.

I. L. R., Vol. XLIX, Calcutta, page 815.

In the High Court of Judicature at Fort William in Bengal.

Jurisdiction.

Before :

The Hon'ble Sir. John George Woodroffe, Kt.
The Hon'ble William Ewart Greaves
and
The Hon'ble Bipin Behary Ghose
} Judges.

The 17th day of January 1922.

The Bengal Nagpur Railway Company, Limited . . . Applicant,

and

The Secretary of State for India in Council . . . . Opposite Party.

Income-tax Act (VII of 1918), section 9 (2) (*iii*).—Interest guaranteed by the Secretary of State and payable in England.

Woodroffe, J.

This is a reference under section 51 (*1*) of the Indian Income-tax Act, VII of 1918. The Bengal Nagpur Railway Company have been called upon to pay tax on Rs. 1,72,60,585 income. This represents earnings of the Railway allocated for payment of the Company's share of surplus profits under the terms of agreement with the Secretary of State, namely, Rs. 14,63,387 and Rs. 1,57,98,766 allocated in payment of :—

(A) A sum of Rs. 1,07,59,381 being the interest debitable to the undertaking of the Secretary of State's Open line capital. This sum is the interest due to the Secretary of State on 15½ Million Pounds capital found by him.

(B) A sum of Rs. 13,07,440 being the payment to the Secretary of State in rupee currency of the amount of the guaranteed interest payable by him on the share of the capital of the Company. This interest is paid on 3 Million Pounds share capital found by the Bengal Nagpur Railway Company and made over to the Secretary of State to be held by the latter absolutely as his property and repayable only in the event mentioned in section 94 of the agreement between the Secretary of State and the Bengal Nagpur Railway Company.

(C) A sum of Rs. 37,31,945 payable on account of interest on borrowed capital raised by issue of debenture stock and debentures. No claim to tax is made by the Government in respect of this sum which item, therefore, need not be further considered.

The Board has held that tax is payable on sums (*a*) and (*b*). Apparently it has treated this matter as if it were the case of a Company owning in the ordinary way a Railway as a private venture and has, therefore, held it to be liable to tax on all earnings save such sums as may be deducted under section 9 (*2*) (*iii*) of the Income-tax Act. In this view only sum (*c*) could be deducted as representing interest on borrowed capital but not sums (*a*) and (*b*) which represent capital contributed by the Secretary of State and the Company respectively and not interest on borrowed capital. But I think the matter cannot be so dealt with, but the liability to tax must be determined with reference to the special agreement between the two parties and the nature of their relation to one another. From this point of view it is conceded that the Secretary of State is the owner of the Bengal Nagpur Railway which has been constructed and is now managed for him by the Company. This is their business on the income of which tax is leviable. In my opinion the principle applicable is that the Company should pay tax on what they get. The question then is what is that sum? It is conceded by Government that sum (*c*) is to be excluded. It is conceded by the Company that they are taxable in respect of the sum of Rs. 14,63,387 representing their share of surplus profits which they get in return for their service in the management of the Railway. The question then is are they liable in respect of any further sum, which means do they get anything else. In my opinion they are not liable in respect of sum (*a*). This is interest due to the Secretary of State on 15½ Million capital found by him. It is true that this capital has been the means whereby profits have been earned in which the Company share. But this is not the Company's property. It as also three Million Pounds supplied by the Company, are the property of the Secretary of State, and all receipts earned by the use of these two sums are paid to Government Account. Thereout the Government supply what sums

are necessary to defray expenditure under the Contract. Out of such receipts the Government repays itself the interest on the capital sum supplied by it. And this interest is deducted before the profits in which the Company are entitled to share can be ascertained. It is this share of surplus profits which is income earned by the Company and so liable to tax. Sum (*b*) represents interest which the Company get for their three Million capital money and which has to be deducted before surplus profits can be ascertained. This is deducted in order that the Secretary of State may meet his obligations to the Company in respect of the three Million Pounds they have made over to him. It is stated that that money was borrowed in England and the liability is to pay interest in England. It is stated in the case of the Company that the sum of Rs. 13,07,440 is payment to the Secretary of State in rupee currency of the amount of the guaranteed interest payable by him on the share capital of the Company. The guaranteed interest on the Company's share capital is payable and paid in London as in the case of a debenture obligation by the Secretary of State and is independent of the earnings of the Railway. The payment it is contended of the sum of Rs. 13,07,440 constitutes the payment of a debt due from the Company to the Secretary of State. In effect the transaction is one in which the Secretary of State pays in London certain monies to the Company which he recoups himself in this country out of the earnings of the Railway. In that view of the case I am of opinion that the Company is not liable for tax in respect of this sum.

I answer then the reference by saying that in my opinion the Company is liable only to tax on the sum stated in the reference as being their share of surplus profits. A copy of this Judgment is directed to be given to the Revenue Authority.

JOHN G. WOODROFFE.

W. E. GREAVES.

I agree.

BIPIN BEHARY GHOSE.

CASE NO. 9.

PUNJAB HIGH COURT, CASE NO. 2 OF 1923.

Bulaqi Shah v. The Crown.

Income-tax Act (XI of 1922), section 34.—Scope of.

* * * * * *

Though the point is not raised in so many words in the reference counsel contends that section 34 does not apply to the present case for another reason, namely, that this income in question has not "escaped assessment." These words, he maintains, cannot be applied to a portion of homogeneous income but only to income of a different class and to a case where the assessee derives his income from different sources, *e.g.*, money lending and house property. In this case the whole of the income of the assessee is derived from money lending. The words used, in my opinion, do not admit of this interpretation and for every and any income whether it be of the same class or type as that originally assessed or of a different class or type, clearly comes within the scope of section 34. * *

M. HARRISON, JUDGE.

12th April 1923.

CASE NO. 10.

BOMBAY HIGH COURT, CIVIL REFERENCE NO. 2 OF 1923.

The Income-tax Commissioner . . . . . Referor,

versus

In *re* Bai Jerbai Nowrosji Wadia . . . . . Opponent.

Reference made by the Income-tax Commissioner at Bombay under section 66 of the Indian Income-tax Act XI of 1922, regarding interpretation of sections 3 (*re* Income-tax) and section 55 (*re* Super-tax) and 4 (*3*) (*i*) of the above Income-tax Act.

The Hon'ble the Advocate-General with the Government Solicitors for the Referor.

Sir Thomas Strangman for the Opponent.

Income-tax Act (XI of 1922), section 4 (*3*) (*i*).—Charitable or religious purpose, Income from—Liable before the property was settled.

JUDGMENT :—This is a reference made to the High Court on an application by the assessee under section 66 of the Income-tax Act XI of 1922. Under section 3 of

the Act the assessee was assessed for super-tax for the year 1922-23 on the income actually earned by her in the year ending the 31st December 1921 which formed the basis of her assessment under section 55 of the Act. Section 3 says :—"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in respect of all income profits and gains of the previous year of every individual, company or firm and Hindu undivided family." By section 4, section 3 of the Act shall not apply to : "Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes and in the case of property so held in part only for such purposes the income applied or finally set apart for application thereto."

On the 10th of November 1921 the assessee executed a Trust Deed whereby she conveyed a part of her property to the R. N. Wadia Charitable Trust Settlement. It is admitted by the Income-tax Collector that the income of the property so held in trust from the date of the Trust is not liable to assessment. But he considered that the income of the property so settled which was earned up to the date of the deed of Settlement was liable to be assessed under section 3. It has been contended by Sir Thomas Strangman, Counsel for the Assessee, that by such an assessment the provisions of section 4 III (*1*) have been contravened and that income derived from property held under Trust or other legal obligation wholly for religious or charitable purposes has been assessed. But we think that there is no substance in that contention as the provisions of the Act are perfectly clear on the point. For the financial year 1922-23, the assessee is assessed on the income profits and gains of the previous year and it is only when the income profits and gains of the previous year include income derived from property held under Trust for religious or charitable purposes that such income is free from assessment. The fact that certain income received during the current financial year is derived from property held upon Trust for charitable purposes does not prevent the liability of the assessee to be taxed on such income received during the previous year before the property was settled. That is to my mind the plain construction of the sections that have been referred to in the course of the argument and we think that the decision of the Commissioner of Income-tax is correct.

A copy of this judgment shall be sent to the Commissioner of Income-tax under section 66 (*5*) to enable him to dispose of the case. The assessee must pay the costs of the reference.

N. C. MACLEOD.

L. C. CRUMP.

11th April 1923.

CASE NO. 11.

ALLAHABAD HIGH COURT, MISCELLANEOUS CASE NO. 223 OF 1923.

I. L. R., Vol. XLVI, Allahabad, Page 1.

Dated Allahabad, the 2nd July 1923.

PRESENT :

The Hon'ble Sir P. C. Banerji, Kt. . . . . Acting Chief Justice,

and

The Hon'ble T. C. Piggott . . . . . Judge.

In the matter of Lalla Mal Hardeo Das Cotton Spinning Mill Company of Hathras.

Income-tax Act (No. XI of 1922), section 10 (*2*) (*iii*).—"Allowance"—Sum paid as interest on money put into the firm by partners—"Registered firm"—Application for registration not filed within period prescribed by rules framed under the Act—Time from which registration becomes effective.

This is a reference by the Commissioner of Income-Tax under section 66 (*2*) of the Indian Income-tax Act, No. XI of 1922. The assessees at whose instance the reference has been made are a firm carrying on business at Hathras, in the Aligarh District, under the style of the "Lalla Mal Hardeo Das Cotton Spinning Company." They may be conveniently referred to hereafter as "the objectors." In the petition which led to the reference they sought to raise sundry questions of detail in respect of which no reference has been

made. The Commissioner's action in this respect has been perfectly correct. The Commissioner is required to refer to the High Court any question of Law arising out of any order made by him under section 32 of the Act. The objectors are seeking to raise questions not referred to in their petition of appeal to the Commissioner; obviously no reference can be made to the High Court on any such question. There remain two points set forth in the order of reference. One of these is of no great practical consequence and may be disposed of at once. The objectors were being assessed to income-tax for the financial year 1922-23 on the basis of the profits disclosed by their accounts for the calendar year 1921. In those accounts a total sum of Rs. 42,882 was shown as interest paid on account of money advanced during the year by partners in the firm for the purpose of carrying on the business. The objectors claim that this interest should be treated as an "allowance" admissible under section 10 (2) (iii) of the Indian Income-tax Act and should therefore be deducted from the net profits of the year before these are assessed to Income-tax. The Assistant Commissioner who examined the books of the firm reports that the money in respect of which this interest is charged in the accounts was not really "capital borrowed for the purposes of the business," but represented "only an advance of capital by the partners." This is so nearly a pure question of fact that it is not easy to formulate any question of law arising thereon in respect of which we can give an opinion. In the order of reference itself the question is stated thus :—

"Is the sum paid as interest to partners for capital put into a firm an allowance admissible under section 10 (2) (iii) ?"

To the question as thus stated our answer is : "No such interest represents merely an assignment of a part of the net profits for the year in favour of partners who are regarded as entitled to such assignment by reason of special advances of capital made by them in the course of the year."

The question whether there has been an advance of capital by particular partners, or a *bonâ fide* borrowing of money by the firm, in which the lender happens to be a partner in the firm, must be treated as one of fact in each case. We are not called upon to enter into questions of fact; but we feel bound to add that the facts laid before us in the course of arguments on both sides have not left us under the impression that the objectors have suffered injustice in this matter.

The other question raised by this order of reference is one of great importance to the objectors. They have been required to pay no less a sum than Rs. 81,641-9-0 as Super-tax on account of the year under assessment. They contend that they are not liable to super-tax, because they were during the financial year 1922-23 a "registered firm" within the meaning of that expression as defined in section 2 (14) of the Indian Income-tax Act. The Commissioner affirming the order of the Assistant Commissioner has held that they were not; and the question has been referred to us in the following form :—

"Whether when the firm did not apply for registration as prescribed by statutory rules prior to the last day by which its return of income for the year was due, it can be held to be a registered firm for the year in question by filing the application prior to the assessment."

Here again the question of law has been stated to us in a form which only admits of one answer, and that answer a negative. By definition a "registered firm" is one "constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner."

By clause (10) of the same section 2 the word "prescribed" means "prescribed by rules made under this Act." It is not denied that certain rules have been made by competent authority, and duly published so as to have effect as if enacted in this Act (*vide* section 59 (4) of the same) which "prescribe" the manner in which a firm entitled to do so can get itself "registered." Those rules have been laid before us. In Rule 2 it is laid down that the application to the Income-tax Officer must be made "on or before the date on which a return is due under sub-section (2) of section 22 of the Indian Income-tax Act." In Rule 3 it is laid down that the application must be in a prescribed form and be accompanied by the original instrument of partnership under which the firm is constituted together with a copy thereof. The Income-tax Officer is empowered in special cases to dispense with the production of the original instrument, but a properly authenticated copy must always be produced.

Now in the present instance, it is not denied that the very latest date on which a return was due from the objectors under sub-section (2) of section 22 of the Indian Income-tax Act was the 5th of July 1922. On this date there was not even in existence "an instrument of partnership specifying the individual shares of the partners" in the Lalla Mal Hardeo Das Cotton Spinning Company : such an instrument only came into existence on July 20th, 1922. Not only therefore is it a fact that the objectors did not apply to the Income-tax Officer within the period limited by Rule 2; but that period actually expired before they had put themselves in a position to make such an application by executing the "instrument of partnership" necessary to entitle them to do so. It follows inevitably that the objectors never brought themselves within the definit[illegible]

"registered firm" by getting the "prescribed particulars registered with the Income-tax Officer in the prescribed manner."

These considerations are sufficient to dispose of the reference; but it is perhaps expedient that we should go into certain points a little further. In the course of an exceedingly able, and indeed exhaustive, statement of the case on behalf of his clients, Dr. Sen, who represented the objectors, raised two points which are not exactly covered by the remarks hitherto made.

First, he contended that, even though his clients may not have presented their application to the Income-tax Officer within the prescribed period, that officer had condoned the irregularity by accepting an application presented to him, in the first instance, on January 2nd, 1923 and once more presented after amendment on January 5th, 1923; that the said officer did actually register their firm by an order which purports to effect registration from January 30th to March 31st, 1923; that such registration, once effected, necessarily operates from the commencement of the financial year 1922-23; and that in any event, the effect of this certificate is to entitle the objectors to immunity from the super-tax for two months of the financial year.

Secondly, Dr. Sen represented in various forms and in connection with different parts of his argument the contention that his clients were entitled to a generous interpretation in their favour of a fiscal enactment; that they were the victims of chicanery on the part of the officials of the Income-tax Department; and generally that the equities of the case were entirely in their favour.

To the first point it would be almost a sufficient answer to say that the mere blunder of an Income-tax Officer could not make the objectors a "registered firm" for the purposes of assessment during the financial year 1922-23 if they were not such within the meaning of the definition. Indeed the exigencies of Dr. Sen's argument brought him perilously near the position that a formal certificate of registration, dishonestly or corruptly issued by an Income-tax Officer in flat defiance of the rules, would bind the Income-tax authorities and carry with it a right of exception from super-tax. In the present instance, of course there is no suggestion of intentional misconduct on the part of the Income-tax Officer. Indeed it is obvious that he did not himself regard the certificate granted by him as of any effect prior to the 30th of January 1923. Nor could it have any such effect, supposing it to be otherwise valid; for in Rule 5 of the rules on the subject it is expressly laid down that such a certificate of registration "shall have effect from the date of registration." Obviously this certificate was never intended to affect the liability of the objectors to payment of super-tax which was being levied in respect of the earnings of their firm during the calendar year 1921. That liability could not be split up so as to be enforced for part only of the financial year 1922-23; the objectors had finally lost their right to the privileges of a "registered firm" for that year, when the 5th of July 1922 went by without their even having executed an instrument of partnership. The certificate issued by the Income-tax Officer on January 30th, 1923 may have been intended to save the objectors trouble by enabling them, during the next financial year to apply for a renewal of a certificate instead of having to take out a new one; it could have no other possible effect.

We can make these matters even clearer by dealing briefly with Dr. Sen's next point.

On April 5th, 1922, the objectors were served with a formal notice calling on them to put in a return of their income for the calendar year 1921, and giving them a month in which to do so.

On May 4th, 1922, the objectors obtained a month's extension of time.

On June 3rd, 1922, they put in two applications. One of these asked for another month's time in which to prepare and submit the return of income; it was on this application that they were given till the 5th of July 1922. The other was an intimation that the firm intended to apply for registration; but it contained an admission that no instrument of partnership had yet been executed, and asked for information on points of procedure, which information was duly furnished.

The 5th of July 1922 passed without any return having been furnished; and on July 17th, 1922, the Assistant Commissioner wrote to the firm and told them plainly that their chance of obtaining registration was over for that year.

On July 20th, 1922, the objectors at last got their instrument of partnership executed; but at the time they seemed inclined to accept the intimation that it was now too late to be of any use for that year.

On October 27th, 1922, the objectors were at last compelled to submit their books for examination; and on December 22nd, 1922, the Income-tax Officer was able to report the result of his examination. The Assistant Commissioner whose duty it was to make the assessment by reason of a general order lawfully issued under section 5 (4) of the Indian Income-tax Act completed his work on January 26th, 1923. One would have assumed that the same general order would have transferred to the Assistant Commissioner from the Income-tax Officer the duty of dealing with any application for registration

which the firm might make. We do not know whether this was the case or not; the point is one which the Commissioner might do well to note so that no such complication may again arise as was permitted in this case. It appears that while the question of their assessment was before the Assistant Commissioner, the objectors went behind his back, to the Income-tax Officer with an application for registration first presented on January 2nd, 1923, and again on January 5th, 1923, after the instrument of partnership had been returned for certain amendments. It was on this application that the Income-tax Officer's certificate of registration was obtained on January 30th, 1923. The Assistant Commissioner was in complete ignorance of these proceedings when he made his assessment on January 26th, 1923. On that date the objectors were beyond all question an "unregistered firm" and were very properly assessed as such.

From this statement of the facts it is clear that the objectors were to blame for not making any return of their income and also for the delay in the production of their books of account. There are no merits whatever in their case. They had lost their right to be dealt with as a "registered firm" for the financial year 1922-23 for the simple reason that they had failed even to provide themselves with an instrument of partnership within the extended period allowed them for the presentation of their return of income. The obvious intention of the rules as shown by the wording of the prescribed form of certificate, is that such applications should ordinarily be presented in the month of April the first month of the financial year. Whereas in the present case the period for making a return of income has been extended there can be no objection to a certificate being issued bearing the correct date of some other month. It will take effect from the date specified therein. When the assessment comes to be made, the officer charged with that duty will have to determine simply whether the firm with whose return or with whose accounts he is dealing, is or is not a "registered firm" within the meaning of the definition. The objectors had been plainly told that they would be dealt with for the year 1922-23 as an "unregistered firm;" their attempt to escape from this position by going to the Income-tax Officer at the beginning of January 1923 was wholly futile. It is they who are attempting to evade a just liability by raising technical pleas and pressing for a strained, and indeed impossible, interpretation of one or two details in the rules.

Our answer therefore to the principal question referred to us is, as we have already intimated, in the negative.

CASE No. 12.

HIGH COURT OF JUDICATURE AT MADRAS. REFERRED CASE No. 20 OF 1922

I. L. R., Vol. XLVII, Madras, Page 197.

25th September 1923.

PRESENT :

The Hon'ble Sir Walter Salis Schwabe, K.C., Chief Justice,

and

The Hon'ble Mr. Justice Coutts Trotter.

The Secretary, Board of Revenue, Land Revenue and Referring Officer. Settlement (Income-tax.)

R. M. A. R. R. M. Arunachalam Chettiar . . . . . Assessee.

Income-tax Act (VII of 1918), section 3 (*2*) (*viii*).—Exchange—Profits arising from dealings in—Liability to tax.

JUDGMENT :—*The Chief Justice.*—The assessee is a Nattukotta Chetti carrying on business in Madras and elsewhere as banker and money-lender. In the year of assessment, he remitted from Madras sums aggregating over 4 lakhs of rupees to Penang, such sums being invested there in Straits Settlements dollars, and ultimately reconverted into rupees and remitted back to Madras. The remittances were made on eight occasions within a period of four months in 1919 and the retransfer to Madras was on thirteen occasions covering a period of four months from the end of 1920 to the beginning of 1921. Owing to the fluctuations in exchange which varied between 83 and 175 rupees per hundred dollars, the assessee made a profit of a considerable amount on the transaction. He has been assessed to income-tax on that profit, and the question referred to this Court is whether he has been correctly assessed. Under section 51 (*1*) of the Income-tax Act

which was then in force any question which has arisen with reference to the interpretation of any of the provisions of this Act may be referred to the High Court. This section probably gives wider powers than section 66 of the Indian Income-tax Act of 1922, the consolidating Act now in force, which limits the reference to the High Court to questions of law. It is not, however, necessary to consider the exact meaning of the words of these sections because, the facts having been found, the question whether or not they bring the income within the reach of any particular section of the Act is a question of law.

Section 3 of the Act applies to all income from whatever source it is derived if it accrues, or arises, or is received in British India. Certain exceptions are set forth in section 3 (2) and among those exceptions is to be found (VIII) "any receipts not being receipts arising from business or the exercise of a profession, vocation, or occupation which are of a casual and non-recurring nature." By the combined effect of sections 3 and 9 income derived from business is chargeable to income-tax in respect of the profits of any business carried on by the assessee. In the United Kingdom income-tax is payable on the balance of profit or gains derived from carrying on a trade or business. I can find no distinction in this matter between the laws of the two countries. The English Acts have not got the exception in so many terms of receipts of a casual and non-recurring nature; but as, by the words of section 3 (2) VIII of the Indian Act, receipts of a casual and non-recurring nature are only exempted when they are not receipts arising from business, the question to be considered both in India and England is whether a particular receipt is properly brought into account or omitted in arriving at the profit of a business. If the transactions are business transactions and result in a profit or loss made in the carrying on of the business, they must be brought into account; otherwise not. The questions which have arisen for decision have been whether particular transactions form part of a business carried on by the assessee. They need not be part of some already established business but they must together form a business. If the transactions form part of the ordinary business of the assessee the profits or losses on them must, of course, be brought into account. But where the transactions are outside the scope of the ordinary business of the assessee it is often a difficult question to decide whether or not they are to be treated as subject to income-tax. Profits may be made by the realisation of security or by the sale of land or moveable property and, in the case of one man they may be merely successful realisations of assets or alterations of investments while in the case of another man they may form part of the income of a business. To give a simple illustration a Barrister might buy a picture and at a later date when the works of the particular artist were in demand, sell that picture and realise a profit. No income-tax would be payable on this profit. If a picture dealer bought a picture and on the same events happening sold it at a profit, that profit would be a profit earned in his business and would be liable to income-tax. So, too, profits made on an isolated speculation are not liable to income-tax, but those made in speculation of a similar kind as a part of business would be liable. A difficult question may, however, arise as to whether the transactions are of such frequency as to amount to carrying on a business. The distinction is well illustrated by the cases of California Copper Syndicate Company, Limited *vs.* Harris, 5 Tax Cases 159, and Hudson's Bay Co. *vs.* Stevens, 5 Tax Cases 424. In the former a company was formed for the purpose of acquiring and reselling mining property and also for working such property. It acquired and worked various properties and then resold the whole at a profit, and it was held that such profit was liable to income-tax and Lord Justice Clark Macdonald in the course of his judgments subsequently approved by the Privy Council in Commissioners of Taxes *vs.* Melbourne Trust Company (1914) Appeal Cases 1001 said: "The question to be determined being is the sum of gain that has been made a mere enhancement of value by realising a security or is it a gain made in an operation of business in carrying out a scheme for profit making." In the latter, a company received by grant from the Crown and as consideration for surrender of their Charter—large tracts of land and then proceeded over a period of time to sell that land in small lots and it was held that the profits made on these sales were not liable to income-tax, the sales being merely realisations of assets, the company not carrying on a trade in buying and selling lands. In Beynon Company, Limited, *vs.* Ogg, 7 Tax Cases 125, a company whose ordinary business was that of coal merchants, Insurance Brokers and Agents of colliery companies purchased on its own account as a speculation 250 Railway Coal Trucks and subsequently got rid of them at a profit. It was held that the profit was made in the operation of the company's business. It was pointed out by Sankey J. that though in most cases an isolated transaction does not fail to be chargeable, it was not possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable property and it was necessary to look at the number of waggons bought, the amount invested and how they were sold, and, in fact, to look at the whole circumstances to say whether the assessee had embarked on the purchase of Railway waggons as part of his business.

Turning to the facts of the case, the assessee was a dealer in money and had by reason of his dealings with the Straits Settlements facilities at hand for dealings in exchange between Madras and the Straits Settlements. He had at Penang agents, themselves bankers, who were in the habit of collecting for him outstandings in his money-

lending business, and as and when required remitting them to India and in the process converting dollars into rupees. During the periods in question in this case, he got regular information by letter and cable from these agents as to the movements of exchange in the Straits Settlements. He sent large sums of money extending over a priod of four months. At first the market went against him and he sent increasing qnantities of rupees, no doubt, with a view to averaging the cost of the dollars. The dollars were by arrangement with the agents left on deposit carrying interest, a fact not in itself conclusive, and when he got them back, by reason of the increase in the value of the rupee he was able to realise by degrees an increasing profit. Taking all these facts into consideration, I think that the right inference to be drawn is that in this case those dealings in exchange had become part of the assessee's banking business, and I think too that even looked at apart from his ordinary business, he did not enter into these transactions as an isolated investment of capital or speculation but as a business of a dealer in exchange.

On these grounds, I hold that the decision of the Commissioner is correct. The assessee must pay the cost of this reference.

Coutts Trotter, J.—I agree.

CASE NO. 13.

HIGH COURT OF PATNA.

Miscellaneous Judicial Case No. 77 of 1923.

I. L. R., Vol. III, Patna, Page 295.

In the matter of The K. M. Selected Coal Company of Manbhum.

For the petitioner—Mr. K. P. Joyaswal.

For the Opposite Party—The Government Advocate.

Income-Tax Act (XI of 1922), section 10 (*2*) (*viii*) and (*ix*).—Cesses levied under the Bihar and Orissa Mining Settlements Act, 1920 and Jharia Water Supply Act, 1914—admissible as business expense.

Dawson Miller, C. J.

This is a reference under section 66 of the Indian Income-tax Act, 1922, for the opinion of the High Court upon certain questions which arise in relation to the assessment of the taxable income of the K. M. Selected Coal Company for the year 1921-22. The Company is the proprietor of a colliery in Jharia and claims that in assessing its income for the year in question certain local rates imposed upon the outturn of the coal in the one case and upon the despatches of the coal and coke in the other should be deducted from the taxable income under the provisions of the Indian-Income-tax Act, 1922. The question for determination is whether in arriving at the taxable income the local rates to which I shall refer in greater detail presently can be deducted under the provisions of section 10, clauses (*viii*) or (*ix*) of the Income-tax Act, 1922. It is admitted that the income payable by the assessee comes under the head of "Business" within the meaning of section 10 and the tax payable in such a case is in respect of the profits or gains of the business carried on by the assessee. The section provides by clause (*2*) that such profits or gains shall be computed after making the following allowances. Then there follow sub-clauses (*i*) to (*ix*) which include amongst other things certain deductions in respect of rent for the premises in which the business is carried on, in respect of repairs in certain cases, in respect of interest on capital borrowed for the purposes of the business, in respect of insurance, repairs to buildings, plant and machinery depreciation and other matters which it is unnecessary to enumerate further. Then follows sub-clause (*viii*) which is in these terms :—

"Any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business."

Sub-clause (*ix*) is as follows :—

"Any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

The rates in question which it is sought to deduct from the taxable income for income-tax purposes are imposed in the one case under the Bihar and Orissa Mining Settlement Act, 1920, clause 23, which provides that the Board (that is the mines Board of Health for the district, established under the Act) shall impose yearly an assessment at rates not exceeding the maximum rates prescribed on all owners of mines in which are employed persons residing in the Mining Settlement, and all persons who receive any royalty rent or fine from such mines, and the assessment by clause (3) of the section shall be based in the case of owners of mines, on the annual output from their

mines. In pursuance of that section a rate was imposed upon the assessee in this case upon the annual output from the mine. The other tax or rate is that imposed by the Bihar and Orissa Jharia Water Supply Act (Bihar and Orissa Act (III of 1914) which by section 45 provides that "There shall be formed a fund to be called the Jharia Water Fund which shall be vested in the Water Board and there shall be placed to the credit thereof in the district Treasury or a Sub-Treasury (1) the proceeds of a tonnage cess on the annual despatches of coal and coke from mines. Section 54 and the following sections in Chapter VI make provision for the levy of the cesses there named. A cess under these sections was imposed upon the assessee in respect of the annual despatches of coal and coke from the mine. It is in respect of these two rates that a deduction is claimed by the assessee in this case.

It is admitted that these rates are local rates within the meaning of clause (2) sub-clause (*viii*) of section 10 of the Indian Income-tax Act, 1922, but it is contended on behalf of the Commissioner of Income-tax that such rate is not a rate in respect of such part of the premises as is used for the purposes of business; that indeed it is not a tax upon the premises at all but is a tax levied upon the owner of the mine in respect not of any buildings or land which may be described as premises but upon the annual output in the one case and upon the annual despatches in the other and therefore that by no straining of the language of clause (*vii*) could you bring the present rates within the scope of that clause. The duties leviable under the two Bihar and Orissa Acts mentioned are not, in my opinion, local rates imposed on such parts of the premises as are used for the purposes of the business within clause (*viii*) of section 10 of the Indian Income-tax Act, 1922. That clause appears to me to contemplate a tax or rate imposed on the premises in the ordinary acceptation of the word, in this connection the buildings and land where the business is carried on or such part thereof as is used for the purpose of carrying on the business such as offices, workshops, warehouses, etc., as distinguished from private residences unconnected with the business. The levy in such cases where the rate is imposed on the premises for Municipal purposes is generally assessed on the annual value of the premises and I do not think it can be said that the word premises includes the annual out-put or the annual despatches of coal from the mines.

With regard to the second point, namely, whether these rates are included under sub-clause (*ix*) of clause 2 of the section the case appears to me to present very much greater difficulty. It must be borne in mind that in assessing a taxable income derived under the head of business it is only the profits or gains of the business that are to be taxed and the question which arises in the present case is whether these profits or gains are to be arrived at after deducting the local rates imposed upon the assessee in the present case. There can be no doubt to my mind that from a commercial standpoint these rates imposed upon the proprietor of the business would be deducted in the Company's balance sheet before any profits could be shewn as the profits of that business. But it is necessary to consider further whether the rates in question can be regarded as an expenditure incurred by the assessee solely for the purposes of earning such profits or gains. It is contended on the one hand on behalf of the Income-tax Commissioner that such expenditure must be voluntary expenditure incurred by the assessee solely for the purpose of making a profit in his business. It is contended on the other hand on behalf of the assessee that it is not necessary that he should voluntarily incur this expense if in fact it is an expense incurred by him in the ordinary course of making his profits and before such profits can be ascertained. The case is to my mind one not altogether free from doubt. In the case of Raja Jyoti Prasad Singh Deo (6 P. L. J. 62) the question arose as to whether cesses imposed on the net annual profits of certain property could properly be deducted under a similar clause in the Income-tax Act of 1918 for the purpose of arriving at the taxable income for the purposes of income-tax. In that case the Bench of which I was a member came to the conclusion, although it was not absolutely necessary for the purpose of that decision, that road cess could not be deducted in arriving at the profits of a business taxable as income. But the reason why that view was taken was that before any cess became leviable at all the profits in the case of a business must first be ascertained and that it was upon those profits when they were ascertained that the cess was to be levied and it was upon the same profits that the income-tax was also to be levied. Therefore one could not, in arriving at the taxable amount either for income-tax or for cess, deduct in the one case cess or in the other case income-tax. The present case however appears to me to present different features. The local rates which it is sought to deduct in arriving at the amount taxable are not rates imposed upon the profits of the business. The rates imposed are tonnage rates upon the amount of coal raised or the amount of coal and coke despatched and are in no sense rates levied after the profits of the business have been ascertained. In fact it is necessary in order to carry on this business and, which is important, before any profits at all can be earned that these rates should be paid, in other words that the actual coal raised and the actual despatches made whether the business shows a profit or not should bear the burden of the rates imposed by the local authorities. That seems to me to take the present case outside the dictum in the earlier case of Raja Jyoti Prasad

Singh Deo. It is true that in one sense the expenditure is not a voluntary expenditure made by the assessee for the purposes of carrying on his business. It is a local rate imposed upon him, possibly against his will, but at the same time when a person enters into the business of a coal-mine proprietor he knows when he undertakes that enterprise that there will be certain expenses connected with the working of the mine which he may not voluntarily incur but which still are part and parcel of the working expenses of the mine and connected with the business of the mine and these expenses will have to be taken into account before the actual amount of profit earned can be ascertained. It does not seem to me that in arriving at the profits the expenses incurred in earning those profits should necessarily be what may be called voluntary expenses. If in fact the very nature of the business requires that certain expenses should be incurred before the profits can be ascertained then I think that such expenses can fairly be said to come within the meaning of sub-clause (*ix*) of clause 2 of section 10 of the Act as expenditure incurred solely for the purpose of earning such profits or gains. In my opinion therefore the local rates which the assessee claims should be deducted from his taxable income in this case should be deducted before the assessment of his income is made.

No specific question is formulated for our opinion in the reference by the Commissioner of Income-tax but the points upon which he requires an opinion are clearly indicated and the answers to those points appear from the judgment just pronounced. I think that the assessee in this case is entitled to his costs of this reference. We think that the cost should be assessed at Rs. 300.

DAWSON MILLER.

Patna, the 21st December 1923.

Jwala Prasad, J.

I agree with the conclusions which have been arrived at by my Lord the Chief Justice.

JWALA PRASAD.

Patna, the 21st December 1923.

CASE No. 14.

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

I. L. R., Vol. LII, Calcutta, Page 1.

CIVIL APPELLATE JURISDICTION.

PRESENT :

The Hon'ble Sir N. R. Chatterji.
The Hon'ble Mr. Justice Mukerji.
The Hon'ble Mr. Justice Chotzner.
The 28th May 1924.

Regarding Rogers Pyatt Shellac Company.
vs.
The Secretary of State for India in Council.

Income-tax Act (VII of 1918), sections 3 to 6—Income-tax Act (XI of 1922), sections 3 to 7, 11, 31 to 33, 42.—Non-Residents—Business connection in British India—Liability to tax.

Chatterji, J.

This is a case stated by the Commissioner of Income-Tax, Bengal, under the provisions of section 66 of Act XI of 1922 and section 51 of Act VII of 1918.

The Rogers Pyatt Shellac Company is incorporated in the United States of America with its headquarters in the City of New York. The Company have a branch office in Calcutta to buy gum, shellac and other Indian products, and a factory at Wyndhamgunj in the United Provinces. No sales are conducted in India by the Company; their transactions are limited to the purchase of shellac and other goods, some of which are purchased on account of a certain Gramophone Company which pay the Company a fixed percentage on the purchase *plus* expense, while the balance is sold in the open market.

Income-tax was assessed for the years 1921-22 as also super-tax, and the tax was paid under protest on the 6th May 1922.

They were similarly assessed for the year 1922-23 and the tax was paid on the 29th March 1923 with a notice that "they shall in all probability appeal against the assessment."

On the 27th June 1923 they made an appeal to the Assistant Commissioner of Income-Tax against tho assessment, and for refund of the amounts paid for income-tax and super-tax respectively for the years 1921-22. A similar petition was made with regard to the assessment for the next year. The Commissioner of Income-Tax on the 13th October 1923, however, confirmed the assessments. Thereafter the Commissioner of Income-Tax at the instance of the Company made a reference under section 66 of Act XI of 1922 and section 51 of Act VII of 1918 as stated above.

The reference was made under Act VII of 1918 as well as under Act XI of 1922, the reason being that the income-tax for 1921-22 was assessed and levied under Act VII of 1918, and that for 1922-23 under the new Act XI of 1922. The provisions of the two Acts are generally speaking similar with certain exceptions.

Section 3 (*1*) of Act VII of 1918 lays down "Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India or is under the provisions of this Act deemed to accrue or arise or to be received in British India." By section 5, certain classes of income are chargeable to income-tax, and they include "(*iv*) income derived from business."

Section 4 of Act XI of 1922 is similar to section 3 of Act VII of 1918 except that it says that the Act shall apply to all income, profits or gains as described or comprised in section 6. There is a sub-section (*2*) added to section 4 of the Act of 1922 which was not in the Act of 1918, which will be referred to later. Section 6 of Act XI of 1922 is also similar to section 5 of Act VII of 1918 only that the word "heads" is used in the former instead of "classes" in the latter, and the item (*iv*) is described as "business" instead of "income derived from business" as in Act VII of 1918. Reading sections 4 and 6 of Act XI of 1922 (sections 3 and 5 of Act VII of 1918) together all income, derived from "business" (1) accruing, arising or received in British India, or (2) deemed under the provisions of the Act to accrue or arise or to be received in British India is taxable income.

Now it is admitted that no part of the Company's income accrued, arose or was received in British India. Section 33 (*1*) of the Act, however, provides that "in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection in British India shall be deemed to be income accruing or arising within British India and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed, for all the purposes of this Act the assessee in respect of such income-tax. The contention of the Government is that although the income neither actually accrued, arose nor was received in British India such income, as laid down in section 33 (*1*) shall be deemed to be income accruing or arising within British India as it accrued or arose whether directly or indirectly through or from business connection in British India. In other words the charging section (section 5) was enlarged by the provisions of section 33 (*1*). On the other hand it is contended on behalf of the Company that section 33 (*1*) is merely what is called a "machinery" section enacted for the purpose of laying down the mode in which the tax is to be levied in the case of a non-resident person, and providing that in such a case his agent is to be deemed to be the assessee in respect of the income-tax.

Now, sections 3 and 5 of the Act appear in Chapter I, which is headed "taxable income." Section 5 as stated above enumerates the classes of income chargeable to income-tax "(*iv*)" class being "income derived from business." Chapter IV of the Act headed "Liability in special cases" contains a group of sections which provide that in the case of minors, lunatics, etc., or persons whose properties are managed by others such as the Court of Wards, Administrator General, etc., the income-tax would be levied and recoverable from the guardian, trustee, the Court of Wards, etc., as the case may be. There is no doubt that sections 31 and 32 are "machinery" sections. Then comes section 33 (*1*), the latter part of which lays down that a non-resident person shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be for the purposes of the Act, the assessee in respect of such income-tax. This part of section 33 (*1*) therefore also is a "machinery" section. The question is whether the first part of the section is also a machinery section or a charging section. As already pointed out section 3 provides that that income not only accruing, arising or received in British India, but also income which under the provisions of the Act is "deemed to accrue or arise or to be received in British India" is taxable income. The first part of section 33 (*1*) lays down that income arising or accruing to a person residing out of British India whether directly or indirectly through or from any business connection in British India *shall be deemed to be income accruing or arising within British India.* Taking the language literally, it seems that income accruing or arising to a non-resident person in certain cases though not actually accruing or arising within British India *shall be deemed* to be income accruing or arising within British India, and reading section 33 (*1*) together with sections 3 and 5, such income is liable to tax. This no doubt would extend far beyond what is recognised in England or had been recognised in British India previous to Act VII of 1918, as the territorial limit of taxation of income derived from business.

On behalf of the Company, we have been referred to certain English cases, and a case in the Madras High Court. The Board of Revenue *vs.* The Madras Export Company, I. L. R. XLVI, Mad. 360.

In Sulley *vs.* Attorney General 5 H and N 711 an American firm carried on a business in New York which consisted in the resale there of goods purchased on their account in England. One of the partners who resided in Nottingham transacted the business of the firm in England which consisted of purchasing and shipping goods for exportation, but no money was received in England except from New York for purchasing the goods. The profits arose on the sale of the goods at an increased price in America. It was held that the firm did not exercise its trade in the United Kingdom so as to subject it to income-tax. Cockburn, C. J., observed "wherever a merchant is established in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, *viz.*, where his profits come home to him. That is, where he exercises his trade. It would be very inconvenient if this was otherwise. If a man were liable to income-tax in every country in which his agents are established, it would lead to great injustice. The argument for the Crown must be carried to this extent, that merely buying goods in this country is a trade exercised here so as to subject the purchases of the goods to income-tax.....It would be most impolitic thus to tax those who come here as customers. The subjects of a foreign state, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Simply by the provision that whosoever carries on the business and receives the profits here shall be assessed. But in the present case, no profits are received by the firm, or exist in this country."

A similar view was taken by the House of Lords in Grainger & Son *vs.* Gough (1896) App. Cases 325, where it was held that a foreign merchant who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income-Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. Lord Watson observed (at pages 340-341): "There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade within the meaning of Schedule D. In illustration of that view I may refer to Sulley *vs.* Attorney General 5 H and N 711 which was decided in the Exchequer Chamber by no less than six very eminent Judges."

The statutes under which the above cases were decided are the Income-Tax Act, 1853 and the Income-Tax Act, 1842. Chapter 34, section 2, Schedule D of Act of 1853 imposes a duty "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom from.....any trade.....exercised within the United Kingdom," and Chapter 35, section 41 of the Income-Tax Act of 1842 provides "Any person not resident in the United Kingdom whether a subject of Her Majesty or not shall be chargeable in the name of.....any factor, agent or receiver, having the receipt of any profits or gains arising as herein mentioned....."

It will be seen that under the English Acts, it is essential that the profits should arise from the *exercise of the trade within the United Kingdom.* In the Indian Acts (VII of 1918 and XI of 1922) however in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection in British India shall be deemed to be income accruing or arising within British India. There is no such provision in the English Acts, and that distinguishes the English Acts and the cases decided thereunder from the Indian Acts.

In the case of Smidth *vs.* Greenwood (1920) 3 K. B. 275 [on appeal (1921) 3 K. B. 583 and in the House of Lords (1922) 1 A. C. 417] the appellants were a Danish firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery which they exported all over the world. They had an Office in London in charge of a qualified engineer who was their whole time servant. He received enquiries for machinery such as the firm could supply, sent to Denmark particulars of the work which the machinery was required to do, including samples of materials to be dealt with, and when the machinery was supplied he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the firm and their customers were made in Copenhagen and the goods were shipped f.o.b. Copenhagen. It was held by Rowlatt, J., that the place where a trade was exercised was the place where the transactions forming the alleged business were closed, in the case of a selling business by the sale of the commodity, and the profit thereby realised, and that therefore the firm exercised their trade in Denmark, and that they could not in respect of the same profits and gains exercise their trade elsewhere.

The question therefore, *viz.*, whether the profits arose from the exercise of trade within the United Kingdom was the same as that decided in the other two cases cited above. But the provisions of section 31, sub-section (2) of the Finance Act (No. 2) of 1915 (5 and 6 Geo. V, C. 89) were also considered in Smidth & Co. *vs.* Greenwood. That section runs as follows :—"A non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly through or from any branch factorship, agency, receivership or management and shall be so chargeable under section 41 of the Income-Tax Act, 1842 as amended by this section, in the name of the branch factor, agent, receiver or manager."

Rowlatt, J., observed "The scope of this section is not very clear, but I am not prepared to hold that its effect is to bring into taxation profits made by non-residents from a trade not exercised in the United Kingdom. To make an extension in the scheme of taxation of that magnitude and importance the Court is entitled to look for words of clear and direct enactment." In the Court of appeal (1921) 3 K. B. 583 (591) Lord Sterndale, M. R., observed "section 31 is only for the purpose of extending the operations of section 41 of the Income-Tax Act, 1842. That section is not a charging section and only relates to the method of charging persons who are made chargeable under Schedule D. The duties mentioned in that section are the duties charged by Schedule D. It has been called only a machinery section, *i.e.*, a section which provides a method of carrying out the charge imposed by Schedule D. I think this is its effect, and the expression 'machinery' has no doubt often been used, and is convenient, but I think it has also often been used in a wider sense than was intended by those who first used it, and may be fallacious, and I prefer not to use it. Section 31, sub-section (1), I think clearly does nothing more than extend the method provided by section 41 of carrying out the charge imposed by Schedule D, and it would be very strange if another sub-section of the same section imposed an entirely new charge not within the schedule at all. I agree with Rowlatt, J., that such a thing if intended, should be carried out with the greatest clearness, and that if a reasonable meaning can be given to the sub-section without producing that effect such a meaning should be given. I think this meaning can be given to it by adopting the construction suggested by the respondents namely, that it merely points out or, so to speak, sums up the effect of section 41 of the Act of 1842 as extended by section 31 of the Act of 1915, still keeping within the limits of the charge of Schedule D." In the House of Lords (1922) 1 A. C. 417 (422) Lord Buckmaster referring to section 31 (2) of the Finance Act 2 of 1915, observed :—"The appellant argued that the effect of that sub-section is to extend the operation of Schedule D of the Act of 1853 and to render the respondents liable to be assessed for income-tax, even though upon the facts they did not exercise trade within the United Kingdom. I am unable to accept the argument that the sub-section has that effect. It is I think important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer. Sub-section (2) here is at the best a sub-section of an extremely doubtful character, and I think there is very great weight in the argument that has been placed before your Lordship by Sir William Finlay and Mr. Bremner that, as the original charging power of the earlier statutes was derived from their schedules, if it were desired to affect and alter the operation of those schedules some clearer and better reference should have been made to their terms than the obscure and indirect reference that must be found in the section under consideration."

The charging provisions of the English Income-Tax Acts are to be found in the Schedules, and Schedule D of the English Act of 1842 (5 and 6 Vict., C. 35 which is similar to that of the English Act of 1918) provides that tax under that schedule shall be charged in respect of—

(*a*) the annual profits or gains arising or accruing—

(*i*) to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere; and

(*ii*) to any person residing in Great Britain from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in Great Britain or elsewhere; and

(*iii*) to any person whatever whether a subject of Her Majesty or not, although not resident within Great Britain from any property whatever in Great Britain or from any profession, trade, employment or vocation exercised within Great Britain.

Section 41 of the same Act provided as follows :—"And be it enacted, that the trustee, guardian, tutor, curator or Committee of any person, being an infant, or married woman, lunatic, idiot or insane, and having the Direction, Control or management of the

property or concern of such infant, married woman, lunatic, idiot, or insane person, whether such infant, married woman, lunatic, idiot or insane person, shall reside in Great Britain or not, shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot, or insane person were capable of acting for himself; and any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of such Trustee, Guardian, Tutor, Curator, or Committee or of any Factor, Agent or Receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof; and every such Trustee, Guardian, Tutor, Curator, Committee, Agent or Receiver shall be answerable for the doing of all such Acts, Matters and Things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same."

The Finance (No. 2), Act, 1915, 5 and 6 Geo. V, C. 89, section 31, lays down—

"(1) Section forty-one of the Income-Tax Act, 1842 (which relates to the charge of Income-tax in special cases) shall, so far as it relates to the taxation of non-residents, be extended—

(*a*) so as to make non-resident persons chargeable to Income-tax in the name of any branch or manager as well as in the name of any factor, agent or receiver; and

(*b*) so as to make non-resident persons so chargeable although the branch, factor, agent, receiver or manager may not have the receipt of the profits or gains of the non-resident.

(2) A non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly through or from any branch, factorship, agency, receivership or management and shall be so chargeable under section forty-one of the Income-Tax Act, 1842, as amended by this section in the name of the branch, factor, agent, receiver or manager."

As pointed out by Lord Sterndale, M. R. [in (1921) 3 K. B. 583 (591)] the duties mentioned in section 31 (of the English Finance Act, 1915) are the duties charged under Schedule D (of the Income-Tax Act of 1842) and sub-section (*1*) of section 31 does nothing more than extend the method provided by section 41 of carrying out the charge imposed by Schedule D, and "it would be very strange if another sub-section of the same section (sub-section 2) imposed an entirely new charge not within the Schedule at all . . . . . such a thing if intended should be carried out with the greatest clearness and that if a reasonable meaning can be given to the sub-section without producing that effect, such a meaning should be given." It appears from the last part of Schedule D of the Income-Tax Act of 1842 that the profits or gains of a non-resident must arise *from trade, etc., exercised within the United Kingdom*, and as Lord Sterndale, M. R., says it merely points out or, so to speak, sums up the effect of section 41 of the Act of 1842 as extended by section 31 of the Act of 1915 *still keeping within the limits of the charge of Schedule D*. In other words the liability to tax is controlled by Schedule D under which it is essential that the profits should accrue or arise from trade, etc., exercised within the United Kingdom, and that the territorial limits imposed by Schedule D cannot be taken to have been induced (quave 'extended'?) unless by clear words to that effect. It is contended by the learned Advocate-General that the Indian Income-Tax Act VII of 1918 does not recognise the territorial limit. Under section 3 of that Act income in certain cases for purposes of the Act, shall be deemed to be profits accruing or arising or to be received in British India, which indicates that income in certain cases though not actually accruing, arising nor received in British India shall for the purpose of the Act be deemed to have accrued, arisen or been received in British India. The Indian Act therefore differs from the English Act in this respect. Although therefore section 31 (*1*) of the Indian Act VII of 1918 is similar to section 31 of the English Finance Act, 1915, there is the distinction that in the former there are no such words as appear in the latter, *viz.*, "*shall be deemed to be income accruing or arising within British India.*"

The Madras High Court in the case of the Board of Revenue *vs.* The Madras Export Company, I. L. R. 46 Mad. 360, which in its facts is similar to the present case, has followed the English case of Smidth and Co. *vs.* Greenwood. It has held that section 33 (*1*) of the Indian Income-Tax Act did not create a new category of income which could be charged under the Act in addition to incomes mentioned under section 5 as chargeable under the Act, but that section 33 (*1*) merely provided a machinery by which non-resident foreigners (amongst others) trading in British India or having business connection in British India could be taxed on income derived by them in British India. But the learned Judges do not appear to have noticed the difference between the Indian Act and the English Act in so far as the former lays down that certain profits though not arising or accruing in British India shall be deemed to arise or accrue in British India.

There are several matters, however, which have to be considered and which have been urged on behalf of the Company. The first is the position of section 33 in the Act. As stated above it comes under Chapter IV headed "Liability in special cases." It is to be observed that sections 31 and 32 dealing with certain special cases (such as guardians of persons under disability, trustees, agents, or Court of Wards, etc.), merely lay down that the tax is to be *levied upon* and *recoverable* from certain persons, while section 33 (*1*) provides that with regard to non-resident persons, income in certain cases shall be deemed to be income accruing or arising within British India. The provision would perhaps more appropriately come in after section 4 (*2*) of the Act XI of 1922 which deals with the converse case. "Profits and gains of a business accruing or arising without British India to a person resident in British India shall be deemed to be profits and gains of the year in which they are received or brought into British India notwithstanding the fact that they did not so accrue or arise in that year provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.

Section 3 of the Act VII of 1918 which comes under Chapter I headed "Taxable income" expressly lays down that the Act shall apply not only to income accruing, arising or received in British India, but also to such income which under the provisions of this Act is "deemed to accrue, arise or to be received in British India." That section contemplates some provisions in the Act according to which income though not actually accruing or arising in British India shall be deemed to have so accrued or arisen, and if a section in the subsequent part of the Act clearly lays down in what cases it shall be so deemed, such provisions must be taken as incorporated in section 3 which deals with "Taxable income," and the mere fact that such provision could have been more appropriately placed in some other part of the Act, cannot take away its effect, if the meaning of the provision is clear.

Sections 7 and 11 of Act XI of 1922 show that income arising out of British India, may in some cases be deemed chargeable with tax. The first head of taxable income under section 6 is "Salaries," and section 7 (*2*) lays down "Any income which would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any Servant of His Majesty in any part of India by Government or by a Local authority established by the Governor-General in Council. The 5th head is 'Professional Earnings' and section 11 (*3*) provides that Professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be profits or gains chargeable under this head." It may be said that sections 7 and 11 appear under Chapter III headed "taxable income," and sections 7 and 11 along with others lay down in detail what would come under the "heads" of income (*i*) to (*vi*) in section 6. That is so, and we refer to those sections merely as illustrations of cases in which the income though not arising in British India *shall be deemed* to be chargeable with tax.

The next point for consideration is that section 33 (*1*) speaks of profits or gains through or from any *business connection* in British India whereas section 5 merely mentions "Income from business." If by the expression "business connection" in section 33 (*1*) was meant something different from "business" in section 5, then it would be going beyond the "clauses of income" which alone according to section 5 are chargeable to income-tax. Section 6 of Act XI of 1922 uses the word "heads" instead of "classes." The former expression seems to have been substituted to make it more comprehensive, we think the same thing was meant by the two expressions "Business" and "business connection" and for this reason. Even if section 33 (*1*) be taken as a "machinery" section, as contended on behalf of the Company, the agent cannot be charged with income-tax, nor can the agent be deemed the assessee in respect of the income-tax, unless the principal is chargeable. The principal is chargeable with tax upon income from "business" and unless the expression "business connection" in section 33 (*1*) was used in the same sense as "business" in section 5, the principal cannot be charged and *a fortiori* the agent cannot be charged with the tax. The section accordingly even as a machinery section would be useless. The English Finance Act (No. 2) of 1915, section 31 (*2*) uses the words "through or from any branch, factorship, agency, receivership or management," and the comprehensive expression "business connection" was probably used in the Indian Act to cover all those words. Then it is pointed out that the word "property" in section 42 (*1*) (which was not in the previous Act VII of 1918) indicates that the section could not but be a "machinery" section. It is contended that the profits of "property" in the British India must accrue or arise in British India, and the fact that the profits of "property" also shall in some cases be deemed to be profits accruing or arising in British India indicates that the section was merely intended to provide for the method in which the tax was to be realised.

The word "property" seems to have been taken from the English Act, though the expression does not appear to have been considered in the English cases cited above.

It is possible to conceive of cases where a property may be situate in British India and the profits thereof may accrue or arise out of British India.

The English Income-Tax Acts lay down a territorial limit. The Indian Act II of 1886 followed the English Law, but in Act VII of 1918 and Act XI of 1922, the Indian Legislature appears to have gone beyond that limit. Whether that is politic and whether it contravenes the comity of nations, it is not for us to consider. We have to construe the Act, and having regard to the essential difference in language between the English and the Indian Acts upon the point under consideration, we are unable to follow the English authorities decided with reference to the English Statutes, or the Madras case referred to above. We accordingly hold that the Company are liable to pay income-tax having regard to the provisions of section 33 (*1*) read with sections 3 and 5 of Act VII of 1918, and section 42 (*1*) read with sections 4 and 6 of Act XI of 1922.

So far as the factory at Wyndhamgunj is concerned, it clearly comes within the Act. Admittedly there is a manufacturing branch of the Company at that place, and under section 2, clause (*3*) of Act VII of 1918 'business' includes among other things any "Manufacture." The income therefore from such manufacture would be income from "business" and as such taxable under sections 3 and 5 of the Act.

We make no orders as to costs.

N. R. CHATTERJI.

I agree.

A. T. CHOTZNER.

Mukerji, J.—

I have read the judgment just now delivered by my learned brother Chatterji, J., and I entirely agree in the conclusions he has arrived at. In view, however, of the importance of the questions involved I desire to make some further observations.

Before dealing with the cases decided under the English Statutes to which our attention has been drawn, I propose first of all to deal with the relevant provisions of the Indian Acts. For this purpose it is not very material to advert to the provisions of Act II of 1886, or the enactment which preceded the same or the subsequent amendments incorporated into the said Act by Act V of 1916 and Act XI of 1903. A perusal of the several enactments makes it clear that the Income-Tax Act of 1918 (Act VII of 1918) effected a radical change in the scheme and scope of operation of this branch of law. The Act of 1918 professes to be a consolidating and amending statute; on any point specifically dealt with in the Act the law is to be ascertained by interpreting the language used in the statute in its natural meaning, uninfluenced by considerations derived from the previous state of the law. [Administrator General *vs.* Premlal, I.L.R. 22 Cal., 788 (P. C.), Narendra *vs.* Kamal Basini, I. L. R. 23 Cal., 788 (P. C.), at pp. 571-572 and Ramdas *vs.* Amir Chand & Co., I. L. R. 40 Bom., at page 636]. Reference to the previous state of the law would be permissible for the purpose of aiding in the construction of a new statute if any provision therein is of doubtful import [Bank of England *vs.* Valgliano Bros. (1891) A. C. 107 at page 145; Robinson *vs.* Canadian Pacific Ry. (1892) A. C. 481 at page 487; Mersey Docks *vs.* Cameron (1864) 11 H. L. C. 443, at page 480]. I propose therefore to deal with the questions which arise on this Reference primarily in the light of the provisions of Act VII of 1918. The question as to what change, if any, was effected by Act XI of 1922 will be considered later.

Reading section 3 (*1*) and section 5 of that Act it would appear quite clearly that the legislature expressly enacted that save as otherwise provided by the Act, all income, that is to say, Salaries, Interest on securities, income derived from house property, Income derived from business, Professional earnings, and Income derived from other sources—is chargeable to income-tax, provided it accrues or arises or is received in British India, or is under the provisions of the Act, deemed to accrue or arise or to be received in British India.

The section is divided into two parts, the first part deals with a reality, *i.e.*, where the income accrues or arises or is received in British India; the second part deals with a legal fiction, *i.e.*, where the income is deemed to accrue or arise or be received in British India. A close examination of the provisions of the Act discloses that the fiction does not purport to transform something unreal into real; the income is there, it has accrued, or arisen or been received, the fiction only fixes the place where it is to be deemed as having accrued, arisen or been received, and the fiction is resorted to in order to make some person other than the beneficiary liable.

There is no provision in the Act under which income is *deemed to be received in British India.* There is only one provision, and that is contained in section 33 (*1*) under which income is *deemed to accrue or arise in British India.* Reading sections 3 (*1*) and 33 (*1*) together it would appear that it is income which *really* accrues or arises or is

reeeived in British India that is liable to tax; by a fiction some kinds of income which accrues or arises *to* a person not resident of British India, is deemed to accrue or arise in British India (ignoring the aspect that it accrues or arises *to* a person outside British India) for the purpose of realising the same from an Agent resident in British India. All these kinds of ineome however are such as may be said to have accrued or arisen at different places in British India by reason of its having been the direct or indirect result of some business conneetion there or outside British India where the ultimate transactions producing the profits or gains took plaee—but under the Act they are deemed to have accrued or arisen in British India so as to be taxable under the Act and recoverable by making some person in British India responsible for its payment. To appreciate correctly the exact significance of these sections a detail examination of some of the provisions of the Aet is necessary.

First of all, turning to section 3 (*1*) of the Act, we find the word 'income' used there. Now, what is income? The term is nowhere defined in the Act. The definitions of "Agricultnral income" and "Total ineome" as eontained in section 2 afford very little assistance in determining what is meant by income. In the absence of statutory definition we must take its ordinary dictionary meaning—"that which comes in as the periodical produce of one's work, business, lands or investments, considered in reference to its amount and commonly expressed in terms of money; annual or periodical receipts accruing to a person or corporation. (Oxford Dictionary.) The word clearly implies the idea of receipt, aetual or constructive. The policy of the Act is to make the amount taxable when it is paid or received either actually or eonstructively. "Accrues," "arises" and "Is received" are three distinet terms. So far as receiving of income is concerned there ean be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word receiving itself. The words 'accrue' and 'arise' also are not defined in the Act. The ordinary dictionary meanings of these words have got to be taken as the meanings attaching to them. 'Accruing' is synonymous with 'arising' in the sense of springing as a natural growth or result. The three expressions 'accrues,' 'arises' and 'is received' having been used in the section, strictly speaking 'accrues' should not be taken as synonymous with 'arises' but in the distinct sense of growing or growing up by way of addition or increase or as an accession or advantage; while the word 'arises' means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seemed to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out by Fry. L., J. in Colquhoun *vs.* Brooks (1888) 21 Q. B. D. 52, at page 59 [this part of the decision not having been affected by the reversal of the decision by the House of Lords in (1889) 14 A. C. 493], that both the words are used in contradistinction to the word 'receive' and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate.

One other matter need be noted in connection with the section. What is sought to be taxed must be income and it eannot be taxed unless it has arrived at a stage when it can be called 'income.' In order to determine whether it is taxable under the Act the place where it has accrued or has arisen or has been received has got to be ascertained. The section ignores the *person* and only takes into account the *place* where the income accrues, arises or is received. Income may accrue at one place, arise at another and be received at a third. Again it may accrue or arise *in respect of* or *out of* something situated at one place but accrue or arise to a person at a different place.

To apply the provisions of the sections 3 (*1*) and 5 aforesaid to concrete cases, six different classes of cases will have to be taken into account; *viz.*, where the income accrues in British India, where it is deemed to accrue in British India, where it arises in British India, where it is deemed to arise in British India, where it is received in British India and where it is deemed to be received in British India. Upon the plain meaning of the two sections aforesaid in all the above six classes of cases the income, provided it comes within one or other of the classes of income, mentioned in section 5 and is not otherwise saved or excepted by the Act, is chargeable to tax. Once an income is found to exist it will have to be examined whether it has accrued or arisen or been received in British India. If so, it is chargeable. If not, the provisions of the Act will have to be looked into to find whether there is any provision under which it is deemed to accrue or arise or to be received in British India.

Now, of the six classes of cases aforesaid, the last two may be dealt with in very few words. If the income is received in British India no matter wherever it may have arisen or accrued, that is to say if it is received by a resident in British India from sources that lie outside, it is taxable. If it is income derived from an outside source and is received outside British India by a person resident in British India it is chargeable

if this receipt outside is deemed under the Act to be receipt within British India. The Act does not expressly say what income received by a person outside British India shall be deemed to be received in British India so as to be chargeable to tax by the operation of section 3 (*1*). So far as receipt outside British India is concerned there are two instances where such receipt has been made chargeable. The Act by section 10, sub-section (*3*) has made provision for a particular case of this nature by enacting that professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be income chargeable under the head of professional earnings. By section 6, sub-section (*2*), any income which would be chargeable under the head of salaries if paid in British India shall be deemed to be so chargeable if paid to a British subject or any subject or any servant of His Majesty in any part of India by Government or by a local authority established by the Governor General in Council. I have not been able to discover any other provision in the Act by which income which is received outside British India (and which neither accrues nor arises in British India nor is deemed by the Act to accrue or arise in British India) has been made chargeable. Both these cases however are cases where the imposition may be justified by the consideration that in one the income has accrued *to* a person who is ordinarily a resident of British India and in the other it has accrued or arisen to a British subject or a servant of His Majesty and has been paid *out of* the British Indian Exchequer and has so accrued or arisen in British India.

To turn, then, to the first four classes of cases, for the sake of brevity and convenience they may be dealt with as really of two kinds—the distinction between "accruing" and "arising" being left out of account for the moment. Taking the cases of a resident and a non-resident separately in connection with the accruing or arising of income as aforesaid, the position is this: If income accrues or arises in British India either to a resident or a non-resident it is chargeable; for, as already observed section 3 does not make any distinction between residents and non-residents. In the case of a non-resident such or so much of his income as arises or accrues to him whether directly or indirectly from any business connection in British India, is under section 33 (*1*) to be deemed to accrue or arise in British India, and is so chargeable under the Indian Income-Tax Act. It will be seen from the very nature of the cases contemplated by the section that no income which does not represent profits or gains, not (*sic*) accruing or arising in point of fact within British India has been made chargeable by this section, nor is a non-resident made liable by this section, as he is already liable by reason of section 3 of the Act. The profits or gains made chargeable are profits or gains which have accrued or arisen within British India. Section 33 (*1*) therefore in my opinion does not go beyond section 3 in any respect; it really makes no income chargeable which is not chargeable under section 3; it imposes no liability on a non-resident which is not imposed by section 3; it merely explains what kind of income, in fact arising or accruing in British India to a resident outside is to be deemed as arising or accruing in British India for the purpose of the Act and provides for a method of realization, namely by assessing the agent and holding him liable for payment of the tax. It is interesting to note that whereas in section 3 (*1*) it is the income that is charged to tax, in section 33 (*1*) the 'profits' or 'gains' are deemed to be the income so liable, indicating that only so much of the income as represents the profits or gains derived under conditions specified in the section are so deemed.

The section as I read it only means that the non-resident assessee is to be made liable to tax for such profits or gains which accrue or arise to him directly or indirectly through or from any business connection within British India. He may have received the income outside British India; it may have accrued or arisen to him while he was outside British India; but the same or such parts of it as may be taken to be profits or gains accruing or arising through such connection is to be deemed as income accruing or arising in British India and so chargeable to tax. In my opinion, in such cases it will have to be ascertained by the taxing authorities what profits or gains (out of the income made by such a person) accrued or arose to such person, directly or indirectly, through or from any business connection in British India. This to my mind is the plain interpretation of the statute. The accrual or arising of income *to* a person is different to my mind from the receipt of the income *by* him; and the overlooking of this distinction in my opinion creates a confusion and makes the interpretation difficult.

The argument that section 33 (*1*) is only a "Machinery section" and should not be treated as a "charging section" loses all its force in the light of this interpretation. As already observed the charging section in the Act is section 3. Section 33 (*1*) does not mean to travel beyond section 3. Its position in Chapter IV is not altogether undeserved as it really imposes a liability on the agent as a special case. The drafting of the section however is not free from defects.

We are not concerned with the policy of the legislature or the question whether the statutes infringe any principles regarded sacred by the comity of nations: But at the same time I do not see how the above interpretation will lead to an unreasonableness or absurdity as it would only charge to tax profits or gains which may be attributable to

business connection in British India. It is obvious, that if they are attributable to such connection there is no reason why they should not be legitimately charged to tax. It is sufficient to say that the imposition of a tax under circumstances such as these would not in any way militate against the well-known principle that the power of taxation of any State is, of necessity, limited to persons, property or business within its territorial jurisdiction.

This brings us to the next question as to what is meant by "business connection"? By section 4 of the Act "income derived from business" is liable to tax. It has been argued that unless the income which is now sought to be charged amounts to income derived from business, it would not be chargeable under section 3 (*1*); and that section 33 (*1*) by enacting that profits and gains accruing or arising directly or indirectly through or from business connection with British India professes to make something chargeable which is not chargeable under section 3 read with section 5 The answer to this argument however is that section 5, Cl. (*vi*) includes 'income from all other sources' and by section 11 'Income derived from all other sources' include income and profits of every kind and from every source to which the Act applies if not included under any of the preceding heads, *i.e.*, (*i*) to (*v*). But even if it be argued that 'income derived from all other sources' may not refer to income of this description—a question, with regard to which I do not wish to pronounce any definite opinion, I do not see why 'profits and gains from business connection' should not be included in the general expression 'income derived from business' which is used in section 5. The expression, it must be admitted, is dangerously vague and it is much to be regretted that in a fiscal enactment a more precise expression has not been used. The meaning, however, does not admit of much doubt; for the context shows that it is such gains or profits as may be calculated to have been made as being that part of the income of the non-resident which is attributable to the connection he has with a business in British India. The word business is one of the large and indefinite import and connotes something which occupies attention and labour of a person for the purpose of profit. The word means almost anything which is an occupation or a duty requiring attention as distinguished from sport or pleasure and is used in the sense of an occupation continuously carried on for the purpose of profits [Smith *vs.* Anderson (1880) 15 Ch. D. 247 at page 258; Rolls *vs.* Milner (1884) 27 Ch. D. 71 at page 88; *re* Marine Steam Turbine Co. (1920) 1 K.B. 193]. A concern by reason of which one can be said to have connection with such an occupation is business connection.

Act XI of 1922 emphasises the distinction between 'income' and 'profits' or 'gains' by introducing 'profits or gains' in section 4 which is the charging section corresponding to section 3 of Act VII of 1918, and instead of the expression "Classes of income" and 'income derived from business' in section 5 of the latter Act, speaks of 'Heads of Income, profits and gains' and 'Business' in section 6. In section 42 of Act XI of 1922 we find the words "business connection or property" in the place of the words 'business connection' in the corresponding section 33 (*1*) of Act VII of 1918. These amendments cast the net wider, by including profits or gains arising or accruing from property as well. It is not inconceivable as to how a non-resident can have profits or gains accrued to him through or from property in British India, *e.g.*, if a property in British India is let out or the value of property in British India is increased and profits or gains accrue or arise but accrue or arise to a non-resident. Section 42 (*1*) will bring these profits and gains within the Act, they being deemed to have accrued or arisen within British India. Such profits or gains accrue in British India where the property is situate though they may acquire only a tangible shape where they are actually received. A further amendment in the shape of the introduction of a sub-section, *viz.*, sub-section (*2*) together with an explanation as to what is or is not to be deemed to be received into British India is also noticeable.

Turning now to the English Statutes, in Colquhoun *vs.* Brooks (14 App. Cas. 493, 503) Lord Herschell observed, "The Income-Tax Acts themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there." This fundamental principle of the English Statutes does not appear in Act VII of 1918 or Act XI of 1922: The question of residence does not arise nor are any territorial limits recognised by the charging sections of the said Acts. Under the Income-Tax Act, 1842 (5 and 6 Vic., C. 35) and the Income-Tax Act, 1853 (16 and 17 Vic., C. 34) the duty is charged upon annual profits and gains in the nature of income from whatever source derived and is imposed under 5 Schedules, A to E inclusive which are framed to include all such sources of income. Schedule D the operation of which is limited to the classes of income not charged under any other schedule, charges to tax income "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere and for and in respect of the annual profits or gains arising or accruing *to any person residing in the United Kingdom* from any profession, trade, employment or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere."

"And for and in respect of the annual profits or gains arising or accruing to any person whatever whether a subject of Her Majesty or not *although not resident within the United Kingdom*, from any property whatever in the United Kingdom or any profession, trade, employment or vocation exercised within the United Kingdom." In the case of a non-resident, therefore the question would arise as to whether the profits or gains have arisen or accrued to him from any trade exercised within the United Kingdom. In Sulley *vs.* The Attorney General (1860) 5 H. and N. 711 it was held that wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another; but he has one principal place in which he may be said to trade, *viz.*, where his profits come home to him; and that is where he exercises his trade. In the Indian Statute the question where the trade is exercised does not come in at all. In Grainger and Son *vs.* Gough (1896) App. Cas. 325 it was held that a foreign merchant who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom does not exercise a trade in the United Kingdom within the meaning of the Income-Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. Lord Herschell in that case observed that there is a broad distinction between trading *with* a country and carrying on a trade *within* a country. Lord Watson observed that there may be transactions by or on behalf of a foreign merchant in one country so intimately connected with his business abroad that without them it cannot be sufficiently carried on, which are nevertheless insufficient to constitute an exercise of the trade within that country within the meaning of Schedule D. Lord Watson further went on to observe referring to the case of Sulley *vs.* Attorney General (1860) 5 H. and N. 711 as follows :— "The learned Judges recognised the principle that purchasing of stock in this country with the view of trading in it elsewhere, does not of itself constitute an exercise of the trade in the United Kingdom when that department of the business from which profits or gains are *directly* realized is carried on in another country." These observations indicate that profits or gains may accrue or arise to a non-resident or may be realised or received by him in respect of business in a country which does not amount to exercise of trade in that country, and that such profits or gains may arise directly or indirectly. The English Statutes by using the words "from any trade exercised within the United Kingdom" left such profits or gains free, while the Indian Acts using a different phraseology in their charging section included them. By the terms of section 33 (*1*) of Act VII of 1918 and section 42 (*1*) of Act XI of 1922 they are to be deemed to have accrued or arisen in British India for the purpose of making the resident agent responsible for the tax. Section 41 of the Act of 1842 may be read as follows : Any person not resident in the United Kingdom whether a subject of Her Majesty or not, shall be chargeable in the name of any factor, agent or receiver having the receipts of any profits or gains arising as herein mentioned. By section 31, sub-section (*2*) of the Finance Act (No. 2) of 1915, "A non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly, through or from any branch, factorship, agency, receivership or management and shall be so chargeable under section 41 of the Income-Tax Act, 1842 as amended by this section, in the name of the branch, factor, agent, receiver or manager." In Smidth and Co. *vs.* Greenwood (1922) 1 A. C. 417 the House of Lords affirmed the decision of Rowlatt, J., in Smidth and Co. *vs.* Greenwood (1920) 3 K. B. 275 and of the Court of Appeal in (1921) 3 K. B. 583. In that case it was held by the Court of Appeal that the sub-section was not a charging sub-section but that it merely summed up the effect of section 41 of the Act of 1842 as extended by sub-section (*1*) of section 31 of the Act of 1915, still keeping within the limits of Schedule D, and it was observed that to hold otherwise would be to hold that such an important alteration has been made in the basis of taxation as the abolition of the condition of exercise of trade within the United Kingdom before a person not there resident can be taxed. "To take the latter course", Lord Sterndale observed, "would be to violate the well-known canon of construction of taxing Acts that no one is to be taxed except by express words." The Indian law does not proceed upon the basis of such a condition but upon the taxability of the income regarded from the point of view of the place where it accrues, arises or is received or is deemed to accrue, arise or be received under the Act. I am unable to assent to the view taken by the Madras High Court in the case of the Board of Revenue *vs.* The Madras Export Company (I. L. R. 46 Mad. 360), for it seems to me that the learned Judges in that case proceeded upon the supposition that the legislature intended no change from the earlier statutes which to a large extent were modelled on the English statutes. That there is now a substantial difference is clear, and has been recognised in the cases, amongst others, of Board of Revenue *vs.* Ramandham Chett; (I. L. R. 43 Mad. 75 at page 86) in regarding Aurangabad Mills (I. L. R. 45 Bom. 1286) and in regarding John and Co. (I. L. R. 43 All. 139).

An objection has been urged that to include income which did not arise or accrue in British India to a non-resident of British India would be to make not actual but "Notional" income chargeable. The taxability of "notional" income is an idea not foreign to the Act, for by section 8 of the Act *bonâ fide* annual value of property has been made assessable as being income which has accrued to the property, though it may

not have actually arisen from it. It is notional in the sense that its quantum has to be determined by calculation but it is real in the sense that it has actually accrued.

In my opinion therefore the answers to questions submitted for our decision should be in the affirmative.

The question as to how the profits or gains attributable to business connection in British India have to be calculated or ascertained is not a matter within the scope of this Reference. The Board of Inland Revenue in the exercise of the powers conferred by section 59 of the Indian Income-Tax Act (XI of 1922) have framed certain rules of which Rule 33 runs as follows :—" In any case in which the Income-Tax Officer is of opinion that the actual amount of the income profits or gains accruing or arising to any person residing out of British India whether directly or indirectly through or from any business connection in British India cannot be ascertained, the amount of such income profits or gains for the purpose of assessment to income-tax may be calculated on such percentage of the turn-over so accruing or arising as the Income-Tax Officer may consider to be reasonable, or an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income-Tax Act), as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income-Tax Officer may deem suitable." The Rule is drawn from the English Statutes and its sufficiency or validity is not a matter for our consideration in this Reference.

MANMATHA NATH MUKHERJEE.

CASE NO. 15.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Referred case No. 8 of 1921.

The Deputy Commissioner and Secretary to the Chief Commissioner of Income-tax office of the Board of Revenue, Madras. } Referring Officer.

Vegaraju Venkatasubbayya Garu, Managing Proprietor of B. S. Mining Company, Gudur. } Assessee.

Income-tax Act (VII of 1918), section 9 (2) (*ix*).—Partner's salaries—Inadmissible deduction.

Statement of the case by the Referring Officer.

* * * * * *

3. Appellants are a firm consisting of 4 partners who share in profits and losses in certain specified proportions. In connection with their assessment in 1920-21, they claimed before the Collector, among other expenditure, a sum of Rs. 38,000 paid to three of the partners as salaries in 1918-19 and 1919-20. Of this Rs. 14,000 was inadmissible because it related to expenditure in the year previous to the year of account. Following the usual practice of commercial accountancy the assets and liabilities for each year are kept distinct and the profits and losses of the year calculated for the purpose of taxation on the result of one year's working only. The balance of Rs. 24,000 was also disallowed by the Collector on the ground that salaries paid to partners are not admissible as deduction from the profits of the firm for income-tax purposes.

* * * * * *

Appellant's contention is that if persons other than the owners of the firm had been employed for the work looked after by the owners the salaries paid to those other persons would have been admissible as deduction from profits and no distinction should have been made because the payments were made to the owners themselves.

If the Company were a regular company and not a firm there would no doubt be some force in the Appellant's contention but the practice in this presidency (and it is believed also in England) has always been to treat all drawings of the partners of a firm as a part of the profits whether they be described as interest, salary or profits. The reasons underlying this practice are probably as follows :—

(1) Where there are profits to divide it is immaterial how the partners decide to allot them amongst themselves. The whole sum for allotment is Profit and taxable as such and any sum allotted to any one partner as salary does not become the less profit because of the method on which its appropriation is decided.

(2) Where there are no profits to divide, *e.g.*, in a year where losses occur notwithstanding any clause in the agreement to the contrary it is impossible for the partners to pay themselves salaries except by advancing them out of their own capital. Such advances can only be recouped again out of earned profits which are taxable as such.

(3) If any other view be held of this problem it would be possible for any firm to allot the whole or more than the whole of its estimated profits in each year as so-called salaries to its partners and show no profits for assessment. It is true that the salaries will themselves be taxable as such but this will be at a lower rate and a loss of revenue will occur.

(4) In this case the Agreement has been drawn up with special intention of presentation in this reference and must be viewed accordingly.

(5) In the present case the amount payable as salaries are Rs. 1,000 a month to one of the partners and Rs. 500 each to two other partners. It has not been suggested that the partners have any special qualification to justify such large rates and it is quite arguable that these sums represent not "salaries" in the real sense of the term, but additional shares of profits of these 3 partners as compared with the share of the fourth and sleeping partner.

* * * * * *

Judgment.—On the facts stated we have no hesitation in answering that the drawings of the partners, by whatever name they are described, are part of the profits and therefore taxable. The assessee will pay Government costs.

* * * * * *

(*January 30th, 1922.*)

CASE No. 16.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

I. L. R., Vol. XLVII, Madras, page 667.

Friday, the Twenty-first day of March, One thousand nine hundred and twenty-four.

PRESENT :

The Honourable Mr. Victor Murray Coutts Trotter, Chief Justice

and

The Honourable Mr. Justice Wallace.

Referred Case No. 10 of 1923.

The Commissioner of Income-tax, Madras, Referring Officer,

The Nedungadi Bank, Ltd., Calicut, by its Secretary, Respondent.

* * * * *

Income-tax Act (XI of 1922), section 10 (*2*), clause (*9*).—Business—Local rate or tax independent of profits—Admissible deduction.

1. This is a reference under section 66 (*2*) of the Income-tax Act, and the question for decision is whether tax on companies levied under section 92 of the Madras District Municipalities Act V of 1920 may be deducted as a business allowance under section 10 (*2*) clause (*ix*) of the Income-tax Act. According to section 92 of the District Municipalities Act, under Notification of the Chairman every company transacting business within Municipalities for profit shall pay a half-yearly tax known as "Tax on Companies" on the scale shown in Schedule IV : provided it has transacted business for more than 60 days in the half-year. Section 16 of Schedule IV lays down the method of assessment, from which it is clear that the assessment is made on the paid-up capital of the company, although in certain cases if the Head Office or a Branch or Principal Office of the Company is not in the Municipality, and it is able to show certain figures of gross income, the tax on the paid-up capital is to some extent reduced. The penalty for non-payment of this tax is set out in section 30 and subsequent sections of Schedule IV. It appears quite clear that this is a tax or a toll, not on profits or on income or on profession, since it is based not on the amount of profit or salary earned, but on the paid-up capital. It

is therefore, in no sense an income or profession tax. It is a compulsory toll on such trading companies without which they are not permitted to carry on their trade for more than 60 days in any half-year. It is not strictly a license fee, but it is nearer in analogy to that than it is to an income-tax.

2. That being the nature of the tax or toll levied, the question is whether it is a species of expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of carning profits or gains. It is clearly not in the nature of capital expenditure since it is not met out of capital and does not diminish the capital. Is it then an expenditure for any other purpose than for the purpose of earning profits or gains? We are of opinion that it is not. It is not a tax on profits or income but a necessary condition precedent to any earning of profits. It is an impost without paying which the firm cannot trade within the Municipality.

3. Arguments by analogy from the fact that income-tax may not be deducted in calculating the income assessable to Indian income-tax are not of any help in this case—since this is in no sense an income-tax. The case quoted by the Government Pleader, *viz.*, the Chief Commissioner of Income-tax, Madras *vs.* The Eastern Extension Australasia and China Telegraph Company, Ltd., I. L. R. 44 Mad. 489, is therefore of no assistance. Another case quoted by him appears to us equally not in point. It is Ward and Company, Ltd. *vs.* Commissioner of Taxes, 1923, A. C. 145. There it was held that money spent by a brewery company in printing and distributing anti-prohibition literature was not "expenditure exclusively incurred in the production of the assessable income" and therefore the company was not entitled to make the deduction, the ground of the decision being that such expenditure was not incurred in the production of the assessable income but was expended with a view to influencing public opinion—against taking a step which would have partly destroyed the earning of profit. In the case in 45 M. L. J. 711 (The Secretary, Board of Revenue *vs.* Munuswamy Chetty & Son) a Bench of this Court to which one of us was a party, held that expenses for legal advice in a dispute between Government and the assessee regarding excess profits duty and in drawing up an income-tax return, could not be legitimately deducted. This case also does not seem to us to assist the decision of the present case. The only useful cases quoted before us are two English cases, Smith *vs.* Lion Brewery Company, 1911 A. C. 150 and Usher's Wiltshire Brewery, Ld. *vs.* Bruce, 1915 A. C. 433, both of which support the assessee. These were cases decided under the English Income-Tax Act, 1842, where a phrase not dissimilar from the phrase which we are now seeking to interpret had to be interpreted, namely, "Money wholly and exclusively laid out or expended for the purposes of such trade." In the former case a brewery company had in order to extend their business acquired certain licensed houses which they let out to tenants who covenanted to retain the company's beer. By thus becoming landlords of those licensed premises the company had to pay a statutory levy imposed by the Licensing Act of 1904, section 3, and the question was whether such payment could legitimately be deducted in estimate of the balance of profits and gains. The House of Lords which consisted of four learned Lords was equally divided and the decision of the Court of Appeal in favour of allowing the deduction was affirmed. One of the learned Judges, the Earl of Halsbury, in that case lays down as a deciding factor in the case that a person engaging in such a business "must if he carries on that business pay this tax; it is the Act of the Legislature which makes him pay it, and it is not a thing that is open to his own will or option." Another learned Judge, Lord Atkinson, called it a compulsory levy and described it as an impost which "must necessarily be paid in order to set up the system which is found to be vital to their trade prospects to set up." In the second case, Usher's Wiltshire Brewery Company, Ltd., *vs.* Bruce, 1915, A. C. 433, all the five learned judges composing the house followed the former case. That case is even stronger in the assessee's favour than the 1911 Appeal Cases case. It was another instance of a brewery company acquiring and letting licensed houses to tied tenants, and it was there laid down that even expenses in respect of premiums on fire insurances over these houses and premiums on insurance against the loss of their licenses for the sale of liquor were legitimate deductions in arriving at the assessable income. These were both cases of expenses properly, though voluntarily, incurred in the extension of the trade. The companies thought it necessary for the extension of their trade that they should become themselves the landlords of the retailing houses and thereby subjected themselves to the compulsory compensation levy. The present case seems to us an even stronger one. The payment of the compulsory levy to the Municipality by way of the tax on companies is not merely for the purpose of extension of trade but is a condition precedent to the exercise of the trade at all within the Municipal boundaries.

4. We are, therefore, clear that the payment of companies' tax compulsorily levied on this company by the Municipality is wholly and exclusively for purposes of the trade and that the object which that payment accomplishes is the same. The answer to the Reference, therefore, is that the expenditure is incurred solely for the purpose of earning profits and gains, and we answer accordingly.

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CASE No. 17.

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

I. L. R., Vol. XLVII, Allahabad, page 68.

CIVIL SIDE.

Revisional Jurisdiction.

Dated Allahabad, the 13th June 1924.

PRESENT :

The Hon'ble Mr. C. Walsh, Acting Chief Justice

and

The Hon'ble Mr. A. E. Ryves, Judge.

Miscellaneous case No. 245 of 1924.

Order on reference submitted by the Commissioner of Income-tax, United Provinces, as per his letter No. 229-I. T., dated the 30th April/1st May 1924, under section 66 of the Indian Income-tax Act, 1922,

In re In the matter of Messrs. Lachhman Das Narain Dass of Cawnpore.

Income-tax Act (No. XI of 1922), section 4, clause (*3*).—Profits of business set apart for charitable purposes—not exempt.

This is a case stated by the Income-tax Commissioner on a question of principle raised by a firm carrying on business in Cawnpore in these Provinces. The business carried on by the firm is that of an oil mill, which includes buildings and other premises and machinery, and is of course carried on by them for profit. It is an ordinary trading business as defined in section 2 (*4*) of the Income-tax Act : "Business includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture." The firm is a registered firm under the Income-tax Act. For reasons, which it is not necessary to specify, the Income-tax Act of 1922 enables a firm to register its business. A registered firm as provided by section 2 (*14*), "means a firm constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner." Certain advantages accrue to the members of a firm so registered, upon which we need not now dwell. This firm was registered on the 9th of January 1923, and the shares of the respective partners—if it is right to describe each of them a member of the firm—were divided in the following way :—Madan Gopal, the head of the firm, had seven annas in the rupee, Benarsi Das had three annas, Kunji Lal had three annas, and a charitable or religious object under the name of Radha Ballabh—a temple in Muttra—had three annas. In substance, of course, that was merely a dedication by the three active members of the firm of $\frac{3}{16}$ths of its profits to charitable purposes. As a matter of fact the $\frac{3}{16}$ths is derived from the profits made in carrying on the business. There is no reason in the world why a firm should not divide $\frac{5}{16}$ths of its profits to charitable or other public purposes, receiving $\frac{1}{16}$th only for its own personal enjoyment. The result would be the same. The proportion so allotted would still be a proportion of the profits made by the business. That is not seriously denied. The objection taken by the firm is that the $\frac{3}{16}$ths of their profits which have been thus allocated to charity in their partnership deed is not liable to taxation on the ground that it is exempt as being devoted to religious or charitable purposes. Upon that point the Income-tax Commissioner who decided against them, has stated a case to this court.

* * * * * *

The question is whether the class of income, of which $\frac{3}{16}$ths in this case is undoubtedly devoted to charity, is within the exemption, or can by any stretch of language be brought within the exemption at all. The exemption relied upon by the applicant is contained in section 4 (*3*). It runs as follows :—"This Act shall not apply to the following classes of income :—

(1) "Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto."

In our view income derived from profits made by a trading concern in business, is not income derived from property held under trust. The provision in the deed in question is merely an allocation of the proportionate part of the profits to religious purposes. The

exemption deals with a totally different subject matter. In most countries in a manner with which we in India are familiar, Government has within certain limits, exempted from the ordinary liabilities to contribute to public revenue, endowed property set apart by pious people, or held under pious trusts for purposes which are wholly religious or charitable, or in the case of properties which are only partly so held, that part alone which is applied by the trust, or the instrument creating it, to religious or charitable purposes, is granted an exemption, and the language used in section 4 (*3*) (*i*) is in our opinion appropriate to an exemption of that kind and to no other. It is impossible to hold, having regard to the terminology used in this Act, that the profits of a trading concern are in any sense derived from property held under a trust or a legal obligation for religious purposes. That view is strengthened by a perusal of sections 9 and 10 in which the Legislature has demarcated the boundary line between property strictly so-called, and a business, and has laid down the circumstances under which income-tax is payable upon property, and payable upon profits derived from a business. In our view it is sufficient for the purposes of this case without deciding any question raised in the Income-tax Commissioner's decision that we should hold, as we do, that the profits for which it is sought to claim exemption in this case, do not come within the exemption clause. Therefore the case must be decided against the applicants, who will pay the appropriate costs in such a case to the Income-tax Commissioner. The applicants must pay the amount certified, being the same as that paid to their own Barrister.

CASE NO. 18.

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

CIVIL SIDE.

REVISIONAL JURISDICTION.

Dated Allahabad, the 28th July 1924.

PRESENT :

The Hon'ble C. Walsh, K.C., Acting Chief-Justice

and

The Hon'ble B. J. Dalal, Judge.

INCOME-TAX CASE.

Miscellaneous case No. 245 of 1924.

In the matter of Messrs. Lachhman Das Narain Das of Cawnpore.

Income-tax Act (XI of 1922), section 37.—Evidence—Power to call for—Not restricted to that produced by assessee.

Order on reference submitted by the Commissioner of Income-tax of United Provinces as per his letter No. 731 of 1924, dated the 18th July 1924.

* * * * * *

We accept the statement of the Income-tax Officer as being really the statement of the case on which our opinion is invited. He tells us that he was not satisfied within the meaning of sub-section (*1*) section 23 with the assessee's return, and that he therefore issued a notice to them under sub-section (*2*) and fixed the date for the hearing, fully appreciating that it was a judicial proceeding in which he could summon independent evidence if he wanted it, or obtain information for himself from such materials as the assessee chose to produce on the appointed day. The assessee and their representatives attended with their books and the Income-tax Officer told them that the wastage which they were claiming to deduct from their gross returns was more than it ought to be, and more than it was in their other mill, or in previous years in this mill. It is obvious that if a person has once already been assessed in respect of the profits of a particular business, and the profits suddenly show a decrease resulting from the same bulk of material, something has happened to create a diminution of the profits, in that respect the onus is upon the assessee not as a matter of law, but as a matter of practice and common sense. If a man is receiving so much a year rental from house property, and he returns a smaller amount and explains the falling off by the fact that three houses

have been burnt down and therefore could not be let to any tenant, the Income-tax Officer would naturally require him to satisfy him of that fact. The Income-tax Officer therefore rightly called upon the assessee for an explanation of this unusual wastage. He summoned nobody as a witness and examined nobody, either secretly or openly, who was not tendered on behalf of the assessee, and no suggestion that he had done so was put to him when he appeared before us. The assessees' first answer when asked for their explanation was that in this mill the material was of inferior quality. The Income-tax Officer refused to accept this, giving as his reason that he knew from the evidence of their books that they bought in bulk material of the same quality for both mills, and on that (to quote his exact words) "they kept quiet," which, as a question of fact, justifies the inference that they were not prepared to dispute the statement which he had made. He thereupon assessed them, disallowing what one may call the excess or abnormal or unusual wastage which their return for that year had put forward. An appeal was brought and they objected before the appellate court that they had no proper opportunity of proving the percentage of wastage which they claimed. That was rather an exaggerated way of stating what had happened in the court below; but the Assistant Commissioner of Income-tax, regarding the assessee as entitled to ordinary justice and the full hearing, which every litigant has a right to, sent the case back to the Income-tax Officer to give the assessee the further opportunity which they desired. What precise opportunity they had been deprived of does not appear, but in fact a re-hearing took place before the Income-tax Officer. On that occasion they produced oral evidence including an expert, * , on whom they greatly relied, and generally directed their evidence, as they were entited to do, to showing that in this mill wastage was high, and the percentage claimed was justified. The Income-tax Officer, knowing that in their other mill they kept a daily stock book by which the wastage could be roughly checked, although owing to the moderation of their claim on that mill he had never had to check it from this stock book, asked orally, without issuing any notice, for their daily stock book. Here again he threw the onus on to them, and they accepted it, by agreeing that they did keep daily records (which the majority of manufacturers enter in stock books) but that these had been kept on sheets and destroyed, and all that could be then produced was a book, or books, which contained a general total at the end of the year, or of some other period. In the view of the Income-tax Officer, both at the first hearing and at the second hearing, after he had been directed by his superior officer to give the assessee a further and better opportunity, they had failed to explain what was the cause of this excessive or abnormal waste. He is the sole judge of fact subject to appeal. Whether he is right or wrong has nothing to do with us. His duty was to take into account the claim, the nature of evidence by which the assessee sought to establish that claim, which he evidently thought, as he was entitled to do, extremely shadowy, and also to take into account the failure of the expert * and other witnesses to explain this abnormality without self-contradiction, and thinking possibly that if an expert like * cannot explain a phenomenon nobody can, and that if an expert breaks down it makes things worse than if he had never been called at all, and that this phenomenon was a new phenomenon in this particular year in this particular mill, and that it did not exist in the other mill of the assessee; weighing all these various facts in the scale, he came to the conclusion that the fair thing to do was to assess them at the figure which he ultimately decided. He did not in fact require them by any notice in writing to produce further evidence on specified points and he did not in fact regard them as being in default so as to enable him to work sub-section (*4*), and he assessed them, after weighing all the evidence direct and indirect, under section 23 (*3*). The above statement of facts though importing, as it necessarily must, the adverse view which the Income-tax Officer took of the assessee's returns and his conduct and his evidence, sets out accurately and impartially the precise position when the case reached ultimately the Income-tax Commissioner. The result of such statement is to show that when the case reached the Income-tax Commissioner there was no objection in law which the assessee could legitimately raise, either by way of omission or commission on the part of the Income-tax Officer, in the proceedings taken by him for ascertaining in fact the fair assessment for which the assessee was liable. I therefore note, as I began, that there is no question of law arising in this case. The application must be dismissed and the assessment must stand, and the assessee must pay the costs of these proceedings.

* * * * * *

For my own part I have no doubt, and I am confirmed by my examination of the other provisions of the Act, that the other evidence which, the Income-tax Officer may require on specified points, under sub-section 3 of section 23, is evidence which he may require from the assessee and of which he may give him notice, specifying the points and requiring its production. It seems to me that this interpretation enables the machinery to work smoothly and naturally, and any other interpretation works difficulty. There is no doubt that the contemplated section 23 is an enquiry such as that which the appellate court under section 31 may direct the Income-tax Officer to hold, or may himself make during the hearing of the appeal. It is deemed to be a judicial proceeding, and the Income-tax

Officer has the same power as a court under the Civil Procedure Code when trying a suit to enforce the attendance of any person and to compel him to give evidence on oath, to compel the production of witnesses and of documents, and to examine witnesses on commission. So that he has all the powers of a Judge in a suit, so far as concern witnesses and documents. This gives him ample facilities for securing information and guidance from rivals in the trade of the assessee, or experts, or past employees, or managers, acquainted either with the particular business of the assessee, or the class of business in the neighbourhood—and no further provision is required in any other part of the Act to vest that power in him. Section 37 is comprehensive and adequate. If sub-section 3 of section 23 gave power to the Income-tax Officer to summon further evidence himself it would be tautologous. It would be merely repeating, in inconvincing and inadequate form, what is expressly provided by section 37. In my view the matter is simple and clear. When the day is appointed, and the notice requiring the assessee to attend and produce evidence and so forth at the enquiry has been complied with, up to that point, there has been no default under sub-section 2. If the assessee makes default under sub-section 2 by failing to attend or failing to produce evidence, then undoubtedly the Income-tax Officer may, and indeed has no option but to, do his best under sub-section 4. But in this imperfect world especially with businesses difficult to understand for any one who has not been specially trained, occasions must often arise when the evidence produced before a tribunal falls short of giving the Income-tax Officer full and complete satisfaction. In this case, for example, the assessee might have said "the wastage is abnormal. I admit it. The fact is that our machinery is worn out. It has given great trouble this year, and partly on that account the wastage has been excessive and our profits much diminished." The obvious course for the Income-tax Officer would be to say "I was not aware of that, and if you satisfy me on that point I shall be prepared to accept your claim of wastage, but before I do that I require you to produce further evidence about the machinery." He may then adjourn the enquiry, fix a fresh date, and in order to prevent mistake require by a fresh notice the assessee to produce other evidence on the specified point, namely on the defect which had appeared in the machinery, on such adjourned date. As my brother pointed out during the argument, such section 2 does not confine the Income Tax Officer to one notice, and such further notice if given would become a notice under sub-section 2. The evidence, if produced, would be other evidence such as the Income-tax Officer has required on specified points, and having obtained it he can then assess under sub-section 3. If the assessee choses not to produce the further evidence on those specified points, then the Income-tax Officer is thrown back on to sub-section 4, just as he is if the assessee has failed to produce any evidence in the first instance, and this view, which seems to me to work, as I have already said, quite easily and to do justice to all parties, derives confirmation from the fact that an order under sub-section 4 of section 23 is unappealable; in other words an assessee who is so obstinate, or fraudulent, that he will not assist the Income-tax Officer by removing these difficulties and tendering further evidence on specified points, is not only penalised at possibly a figure higher than the true figure, but is also deprived of the right of appeal, which is given to those who try their best even though the tribunal does not accept their views. However, these observations do not really arise, inasmuch as in our view no question of law on the facts stated is open for us to decide.

* * * * * *

By the Hon'ble Mr. Justice Dalal.

In my opinion no question of law arises in this case, and we are not required to pronounce any decision under section 66. The Income-tax Officer made an assessment under section 23 (*3*) of the Income-tax Act. Both the applicant and the Income-tax Commissioner have submitted statements to this court. They appear to be labouring under the mistake of reading this clause of section 23 disassociated with the rest of the Act. The applicant desires us to hold that the Income-tax Officer could hear evidence only of witnesses produced by him, while the Income-tax Commissioner expresses alarm in case this Court held that by the word 'require' in this clause is meant 'require from the assessee.' The Commissioner enquires how a fair assessment is to be made if the Income-tax Officer is confined to hear evidence produced by the assessee only and not any other evidence. This clause however is to be read with the rest of the Act, and it does not take away the power of the Income-tax Officer to call for and hear evidence under the powers he has under section 37 of the Act. The only difference between clause 3 and clause 4 is that in cases falling under clause 3 he is to arrive at an assessment to the best of his judgment on the evidence before him, while under clause 4 he is to decide in the absence of evidence. We have examined the Income-tax Officer and read his judgment and the judgment of the Income-tax Commissioner. Both officers have arrived at a finding on proper and legal evidence, and it cannot be said that those findings are based on mere conjectures without any evidence to support them. Under the circumstances there is no question of law before the Court.

I agree with the order proposed by his Lordship.

CASE NO. 19.

HIGH COURT, BOMBAY.

CIVIL REFERENCE NO. 14 OF 1924.

I. L. R., Vol. XLIX, Bombay, page 362.

The Commissioner of Income-tax, Bombay Presidency,

Bombay . . . . . Referer,

versus

Messrs. Haji Jamal Nur Mahomed & Company . . . Assessees.

Reference made by the Commissioner of Income-tax, under section 66 (*2*) of the Indian Income-tax Act for the opinion of the High Court on a question regarding the interpretation of Section 10 (*2*) (*iii*) and (*ix*) of the Indian Income-tax Act.

The Honourable the Advocate General instructed by the Government Solicitors, for the Commissioner of Income-tax.

Mr. B. J. Desai instructed by Messrs. Motichand and Devidas, Attorneys for the Assessees.

Income-tax Act (XI of 1922), section 10 (*2*) (*iii*) and (*ix*).—Payments to "Mudibhagidars."

Judgment.—As the question upon which we are required to express our opinion is not categorically formulated, we may state the essential facts and the question before proceeding to express our opinion thereon.

The assessees in this case are three brothers who are doing business in the name of Messrs. Haji Jamal Nurmahomed & Co. They attract capital for the purpose of their business by means of borrowings from persons who are described as "Mudibhagidars" under an agreement with them. The arrangement is that instead of the "Mudibhagidars" being given any interest on the advances made by them to this firm, they receive certain specified shares in the profits of the business, and they are not responsible for the losses, if any. It is common ground that they are not partners in the business. In the year under consideration this firm made a profit of Rs. 1,27,810-9-6. Out of that according to the agreement with the "Mudibhagidars" they have to pay Rs. 63,065-1-3 for the advances made by the various "Mudibhagidars." The question that arises on this reference relates to this sum of Rs. 63,065-1-3 payable to the "Mudibhagidars" for advances made by them to this firm. With reference to that, the question is whether they are entitled to an allowance under section 10 (*2*) (*ix*) of the Indian Income-tax Act (XI of 1922). Under this clause they would be entitled to an allowance in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains.

After a consideration of the arguments urged on both sides we are of opinion that this sum cannot be treated as expenditure incurred solely for the purposes of earning such profits or gains within the meaning of this clause. Our reasons for this opinion may be briefly stated. In the first place, the advances made by the "Mudibhagidars" are clearly in the nature of capital borrowed for the purposes of business. With reference to the allowance to be made in respect of the capital borrowed for the purposes of the business, there is an express clause, *viz.*, clause (*iii*) of that sub-section. Under that clause the allowance can be made for the amount of the interest paid where the amount of interest in respect of capital borrowed is not in any way dependent on the earning of profits. In the present case admittedly the amount payable to the "Mudibhagidars" is dependent upon the earning of profits. So even if the payments of certain portion of the profits to the "Mudibhagidars" are to be treated as being in lieu of interest within the meaning of clause (*iii*), as they are dependent on the earning of profits, the profits would not be liable to any deduction or allowance in respect thereof. It would be rather an anomalous result if under clause (*iii*) which is directly applicable to capital borrowed for the purposes of the business, an allowance cannot be made, still, it should be capable of being made under clause (*ix*). There is considerable force, in the argument urged on behalf of the Crown that in this case if an allowance cannot be made under clause (*iii*), it cannot be made at all. Still we have to consider the argument urged on behalf of the assessees whether this can be treated as expenditure incurred solely for the purpose of earning such profits or gains. Without attempting to define the exact scope of this clause, it seems to us to be sufficient to say that payments to be made in certain proportion out of the profits on the capital advanced for the purposes of business cannot be treated as expenditure incurred solely for the purposes of earning such profits or gains within the

meaning of clause (*ix*) of sub-section (*2*), of section 10. We are therefore of the opinion that the assessees are liable to be charged in respect of this sum payable to the "Mudi-bhagidars" and are not entitled to any deduction claimed by them.

Costs of this reference to be paid by the assessees on the Original Side scale.

2nd October 1924.

(Signed) L. A. SHAH.

(Signed) C. A. KINCAID.

CASE No. 20.

IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Reference side . . . . . Civil.

Case No. 27 of 1921.

I. L. R., Vol. III, Lahore, page 349.

PRESENT :

Sir Shadi Lal, Kt., *Chief Justice.*
Mr. Justice Scott Smith.
Mr. Justice Broadway.
Mr. Justice Abdul Rauf

and

Mr. Justice Martineau.

Case referred under section 51 of the Indian Income Tax Act (Act No. VII of 1918) by the Financial Commissioners, Punjab, with No. I. T. Review No. 22-4, dated the 20th September 1921, for orders of the High Court.

Rai Bahadur Sunder Dass . . . . . *Petitioner,*

versus

The Crown . . . . . *Respondent.*

Petitioner : by Bakshi Tek Chand, *Advocate* and Lala Mehar Chand, Mahajan, Vakil.
Respondent : by the *Government Advocate.*

Income-tax Act (VII of 1918), section 3, sub-section (*1*).—'Received'—Meaning of.

This is a reference under section 51 of the Indian Income Tax Act VII of 1918, which empowers the Chief Revenue authority, in the event of a question arising with reference to the interpretation of any of the provisions of the Act of any rule thereunder, to draw up a statement of the case, and refer it with his own opinion "thereon to the High Court." The Financial Commissioner of the Punjab, who is the Chief Revenue authority contemplated by the section, has drawn up a statement of the case but has not complied with the provision of the law requiring him to record his own opinion upon the question referred to the High Court. It is, however, unnecessary to delay the matter for remitting the case to him for his opinion and we accordingly proceed to determine the question.

The statement of the case submitted to us shows that the assessee *Rai Bahadur Sunder Das* (who died during the pendency of the reference) was a Contractor residing in the Punjab who had done extensive work for Government on the Frontier of Baluchistan.

It is common ground that on account of the work done by him as a contractor during the war he received large sums of money from Government, but all the payments were made to him at Quetta in British Baluchistan which is excepted from the operation of the Income Tax Act except that part of the Act which imposes the tax upon salaries. It appears that in the financial year 1919-1920, the assessee invested about 23 lakhs of rupees in the Punjab, mainly in buying immovable property, and the whole of the sum has been treated as the income of one year. We are not concerned with the question whether the

aforesaid sum has been rightly held to be income, nor are we called upon to determine the matter whether that sum should be regarded as the income of one year or the accumulated income of more than one year. The only point upon which we are invited to pronounce our opinion is whether the alleged income comes within the purview of section 3, sub-section (*1*) of the Income Tax Act and is consequently liable to income-tax.

Now, the aforesaid sub-section defines taxable income as income which "accrues or arises or is received in British India, or is under the porvisions of this Act, deemed to accrue or arise or to be received in British India." It is not contended that the latter portion of this sub-section has any application to the case before us, and it is also admitted that the income in question accrued or arose not in the Punjab, but in British Baluchistan, which as already stated, is exempted from the operation of the Act. The matter then is reduced to this. Was the income "received" in the Punjab? Now the statement of the case makes it absolutely clear that a very large sum of money was received by the assessee at Quetta and that a portion of it was afterwards invested in the Punjab. Upon the material supplied to us we are not in a position to say whether the sum invested in the Punjab was actually brought into, or transmitted to, the Punjab, whether it was paid to the vendors of the immoveable property by cheques drawn upon a bank in Baluchistan.

Assuming, however, that the assessee after receiving the money in Baluchistan brought it into, or transmitted it to, the Punjab, I do not think that the money thus brought or transmitted can be held to be income received in the Punjab. The assessee undoubtedly received it in Baluchistan where he was not chargeable with the tax, and I fail to understand how he can receive the same thing again when he has not parted with it in the interval. Whether he brought the money with himself or transmitted it by a cheque or by any other method, it remained all the time under his control, and the process cannot be described as a second receipt of the money.

The Act contains no definition of the word "receive" or "received," but in Murray's Oxford Dictionary the expression "receive" is defined as "to take in one's hand or into one's possession (something held out or offered by another) to take delivery of (a thing) from another, either for oneself or for a third party." In the Imperial Dictionary the same expression is defined as "to get or obtain; to take, as a thing offered, given, sent, committed, paid, communicated or the like; to accept." It seems to me that the word "receive" implies two persons, namely, the person who receives and the person from whom he receives. A person cannot receive a thing from himself.

The rule of interpretation applying to fiscal enactments is thus stated by Lord Cairns in *Partington* v. *Attorney General* (1869), L. R. 4 H. L., 100 :—

"As I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction certainly such a construction is not admissible is a taxing statute where you should simply adhere to the words of the statute.

It is a sound principle that the subject is not to be taxed without clear words to that effect; and that, *in dubis* you are always to lean against the construction which imposes a burden on the subject.

Bearing these principles in mind and taking the expression "received" in its ordinary dictionary meanings, I am of opinion that the assessee, who had already received the money in Baluchistan, did not receive it again when he brought it into, or forwarded it to, the Punjab. I would therefore hold that he is not taxable on the alleged income mentioned in the reference.

Sd/- SHADI LAL,

Chief Justice.

Dated 12th May 1922.

I entirely agree with the learned Chief Justice.

Sd/- H. SCOTT SMITH,

Judge.

Dated 15th May 1922.

I agree, I think, I. L. R. 43 Mad. 75 relied on by Mr. Jai Lal is distinguishable.

Sd/- A. B. BROADWAY,

Judge.

Dated 16th May 1922.

I also agree.

Sd/- S. A. RAOOF,

Judge.

Dated 17th May 1922.

I agree.

Sd/- A. E. MARTINEAU,

Judge.

Dated 17th May 1922.

CASE No. 21.

IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Miscellaneous Side . . . . . Civil.

Case No. 655 of 1923.

PRESENT :

Mr. Justice Broadway,

and

Mr. Justice Zafar Ali.

Application under section 66 (*3*) of the Indian Income Tax Act XI of 1922, and case referred by M. L. Darling, Esq., Income Tax Commissioner, Punjab, and North-West Frontier Province, Lahore, with his letter No. 505-J. M., dated 21st August 1924, for orders of the High Court.

Application by Messrs. Ishar Dass, Dharm Chand, Petitioners.

Income-tax Act (XI of 1922), sections 66 (*2*) and 66 (*3*).—Application under—Question of law to be specified in.

* * * * * *

It seems to me that the application under section 66 (*2*) to the Commissioner should state the questions of law which the petitioner desires to be referred to the High Court and I am also inclined to the view that the application under section 66 (*3*) should also specify the question or questions of law which the applicant considers ought to have been referred to the High Court by the Commissioner. In the present case, three points were taken before the Commissioner in the application under section 66 (*2*). One question alone was raised in the application to this Court under section 66 (*3*), and it seems to me that had the Commissioner confined his reference to the point raised before this Court objection could not have been taken to his action. As he has, however, stated the case on the other question I think it necessary to dispose of it.

In this connection an examination of the Proceedings shows that the enquiry was not a cursory or a summary one. The Income Tax Officer called for the accounts and after an examination of them, as well as of an auditor's report based on them, came to the conclusion that they were not reliable. This undoubtedly is a pure question of fact. The Income Tax Officer then after a consideration of the dealings accepted the turnover as shown by the petitioners and came to the conclusion that a flat rate of 5 *per cent.* was a reasonable amount to fix. His finding that a profit had been made is also a question of fact, and the assessment based on a 5 *per cent.* flat rate cannot be regarded as reasonable.

Further, in the present case it will be seen that the petitioners themselves offered to pay on one lac, and I would, therefore, hold that the conclusions arrived at by the Income Tax Officers are correct, and would dismiss this application with costs.

Sd/- A. B. BROADWAY,

Dated 20th January 1925. - *Judge.*

I coneur.

Sd/- ZAFAR ALI,

Judge.

Dated 20th January 1925.

CASE No. 22.

HIGH COURT OF JUDICATURE AT ALLAHABAD.

I. L. R., Vol. XLVII, Allahabad, page 368.

Civil Side.

Revisional Jurisdiction.

Dated Allahabad, the 18th December 1924.

PRESENT :

The Hon'ble C. Walsh . . . . . Judge,

and

The Hon'ble A. E. Ryves . . . . . Judge.

Miscellaneous case No. 307 of 1924.

In the matter of Messrs. Chuni Lal Kalyan Das of Agra.

Income-tax Act (XI of 1922), section 4 (*3*), clause (*vii*).—Business—Casual gains from —Meaning and examples of.

In this case we are required to answer three questions submitted to us in a case stated by the Commissioner of Income Tax under section 66 of the Income Tax Act of 1922. The case is very clearly stated by the Commissioner of Income Tax in the document before us dated the 1st of November 1924. Although question C comes last, it is desirable to refer to the answer which we are compelled to give to that question. The Income Tax Commissioner agrees that under the peculiar circumstances of this case, which really were adopted by him for the convenience of the assessee, the information acquired by his department that the assessee had engaged in other transactions, must be excluded from consideration, and that this matter must be judged upon the hypothesis that the transaction or adventure in question was an isolated transaction in the year of assessment. The facts are that when the books of the assessee were examined, he having been in regular business as a cloth and grain merchant, which regular business he had given up an item was found relating to the year of assessment of Rs. 60,000 entered as having been received as brokerage in the transaction of the sale of the Mills of Messrs. John and Company of Agra to Messrs. Chari and Company, who floated the Agra United Mills Company, Ltd. It is a fact that this sum was the balance of an entire sum of Rs. 75,000, Rs. 15,000 of which had already been paid but that fact does not affect the question we have to answer. The question is whether that sum is a receipt, not being a receipt arising from business or the exercise of a profession, vocation, or occupation, which was of a casual and non-recurring nature. In answer to that question one first has to determine the grammatical construction of the exemption. In so doing one has to bear in mind that it is an exemption and therefore of a negative nature, and inasmuch as it does not correspond with any provision contained in any similar legislation in England, and has not apparently been the subject of any decision in India, we have to interpret it as a matter of first impression guided only by the arguments of counsel on either side. In our view the passage beginning with the word "not" and ending with the word

"occupation" is an exception upon an exception that is to say the word "which" relates only to receipts which are not receipts arising from business or the exercise of a profession, vocation or occupation. If the argument on behalf of the assessee were adopted, the result would be to strike out that qualifying passage from the section and to make all receipts, whether arising from business or not which are of a casual and non-recurring nature, within the exemption. We therefore hold that a receipt arising from business or the exercise of a profession, vocation or occupation does not come within the exception.

The next question is whether on the facts stated, it was open to the Commissioner to hold that this was a receipt arising from business or the exercise of an occupation. He says, and we agree with him, that the particular transaction is certainly one of the business of a broker, and that it comes within the definition of business. The assessee at one time appears to have taken the same view, for he entered it in his books as a business transaction and that fact alone constitutes evidence upon which the Commissioner might rightly find as he has done, that it was a receipt arising from business. But in our view the definition of the word "business" as used in section 2, sub-section (*4*) places the matter beyond doubt. The word "business" is there defined as including any adventure, and it is not possible to exclude from the expression "adventure," indeed, successful adventure, the negotiation of a sale of a large mill which resulted in a commission payable to the value of Rs. 75,000. The answer to question A therefore is that the clause exempts only receipts of a casual and non-recurring nature, which are not receipts from business or the exercise of a profession, vocation or occupation by an assessee.

It would be superfluous for us to give an answer to question B upon the assumption that our answer to the question A were accepted as final. But in accordance with the order of this court directing a case to be stated the question has been submitted to us and has been argued on both sides. In our view this transaction although an isolated transaction, was not of a casual or non-recurring nature. To some extent the discussion of this question overlaps the question whether a particular receipt is a receipt arising from business or the exercise of a vocation. Cases were cited to us on behalf of the assessee, such as Assets Co., Ltd., *versus* Forbes, III Tax Cases, page 542, 34 S. L. R., page 486, decided in 1897, and the unreported case of Commissioners of Inland Revenue *versus* Sangster K. B. D. 1919, which appears to have been an excess profits duty case decided in 1919, the report of which is not before us. Following upon these two cases is the decision of the Privy Council in the case of Commissioners of Taxes *versus* Melbourne Trust Ltd., XIV Appeal Cases, page 1001. In our opinion these cases have no application to the question before us, as they deal with the well known problem, much debated, as to whether in a particular case the realisation of assets is merely an enhancement of capital or the result of carrying on trade, so as to be in substance and in fact the receipt of income. In taking the view we do, we found ourselves mainly upon the use of the word "nature" in the exemption. The word is not "occurrence." If the language were "a casual or non-recurring occurrence" there would be much to be said for the contention of the assessee. But the expression "nature" appears to us to be a word used independently of the accident of the event happening in fact once only or more often in a fortunate year. It connotes a class of dealing which might occur only once, but which might occur several times. Now the adventure of a business man who is enabled through his business associations to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non-recurring in the sense that so successful an adventure would not be likely to occur again. But on the other hand it is a class of transaction which might occur to any such business man once only or half a dozen times again, during the course of the year. The Government Advocate put what may be said to be a decisive illustration of the true meaning of the word "nature" when he pointed out that if you sold your own house at a profit, although the question would also arise as to whether the result of that transaction was a profit at all but rather only enhanced capital it would in any discussion as to whether it was brought within this exemption undoubtedly be a transaction of a non-recurring nature. You could not do it twice. But if on the other hand you engaged in a solitary transaction of bringing two of your friends together and negotiated the sale of the house of one of them to the other and thereby earned a commission, you would in our opinion be carrying out a transaction which although casual in fact, would not be of a non-recurring nature, because having done so once with success, you might be asked by some vendor to do it again. Our answer therefore to question B is that the particular profit in question was not of a casual and non-recurring nature within the meaning of the section.

Our answer to question C is—No.

High Court at Allahabad.
True Copy.

Sd/-

Assistant Registrar.

CASE NO. 23.

HIGH COURT OF JUDICATURE AT ALLAHABAD.

Civil Side.

Revisional Jurisdiction.

Dated Allahabad, the 18th December 1924.

PRESENT :

The Hon'ble C. Walsh . . . . . Judge,

and

The Hon'ble A. E. Ryves . . . . . Judge.

Miscellaneous Case No. 268 of 1924.

In the matter of Messrs. Chuni Lal Kalyan Das of Agra.

Income-tax Act (XI of 1922), section 6 (*4*).—Contracts—Wagering—Profits from—Liability to tax of.

We have no hesitation in answering the question submitted to us in this case by the Commissioner of Income Tax in the statement of the case dated the 23rd of May 1924 "are the profits or losses arising from wagering contracts to be taken into account in an assessment for income tax purposes," in the affirmative. There is no ground for saying that the profits arising from an illegal business are not taxable. There is not a word in the Act to suggest anything of the kind, and it is a fallacy to say because the taxing authority levies from a person who is carrying on a profitable business, but an improper and illegal business or profession that therefore the authorities are countenancing such a profession. They are doing nothing of the kind. Their permission is not required and is not given, and cannot be withheld to a person who chooses to carry on an illegal business, but the tax upon the profit arising therefrom has to be paid in common with the tax paid by every honest trader. Section 6 (*4*) provides the head of income chargeable in respect of business. The mere fact that the business is speculative, or even gaming and wagering within the meaning of that expression does not make it any the less business. For example supposing the question was one of profit made by a book maker, as to whose business there can be no doubt whatever that it is entirely gaming and wagering. Section 11 provides that the tax shall be payable under the head of professional earnings in respect of the profits of any vocation followed by the assessee. In the year 1886 the English Courts decided, and the decision has never been called in question that a book maker attending a race course was carrying on a vocation (Partridge *v.* Mallandaine XVIII Q. B. D., page 276). Where both the words "business" and "vocation" are used it may be appropriate to describe a book maker's business as a vocation, but the greater includes the less, and it is clearly included in the word "business" in our opinion. The same view seems to have been taken in the text books on the subject with regard to the vocation of singer or prostitute, and the Calcutta High Court in the case of Brinda Kishore Manikya *versus* Secretary of State for India, I. L. R. XLVIII, Calcutta, page 766, held that illegal cesses were assessable to income-tax. No doubt a burden is placed on the Income Tax Officer to discover how far losses returned by assessees may be genuine, or to what extent an assessee may have attempted to conceal gain, but that is what the Department is there for. Although it is not strictly relevant, we may point out that any other view would result in an enormous burden being placed upon the Income Tax Authorities, namely, of deciding in every single transaction which appeared in the books of any assessee in their jurisdiction to be of a speculative nature, whether it was a gaming transaction within the meaning of the Contract Act, and therefore against public policy. That question is an extremely difficult question to decide in many cases. A large number of merchants and other people carry on extensive business of a speculative nature, which is not hit by the section in the Contract Act with regard to gaming, because although the transaction may result in differences, the legal effect of the contract may be to entitle the party to actual delivery. It is none-the-less speculative in character, and anybody concerned with the daily business of the courts knows how difficult it is sometimes to ascertain whether a speculative transaction is really a gaming one or not. All such transactions in our opinion are business, and the profits arising therefrom are taxable under this Act.

High Court at Allahabad.

True Copy.

Sd/-

Assistant Registrar.

CASE No. 24.

CIVIL REFERENCE No. 19 OF 1924.

Commissioner of Income Tax, Bombay Presidency . . . . Referor

versus

Sir Purshottamdas Thakordas . . . . . Assessee.

Reference made by Khan Bahadur J. B. Vachha, B.A., B.Sc., Commissioner of Income Tax, Bombay Presidency, under section 66 (*2*) of the Indian Income Tax Act of 1922.

The Hon'ble the Advocate General with the Government Solicitor for the Referor.

Sir Chimanlal Setalwad with Messrs. Captain and Vaida for the Assessee.

Income-tax Act (XI of 1922), section 2 (*4*).—Business—Casual gains from—Meaning and examples of.

Judgment:—This is a reference under section 66 (*2*) of the Indian Income Tax Act XI of 1922 by the Commissioner of Income Tax, Bombay Presidency, in the matter of the assessment of the income of Sir Purshottamdas Thakordas, hereafter called the assessee. In his return of income for the purposes of assessment for the year 1923-24, the assessee while declaring his income from all sources had made a note as under :—

> "Besides this, I received during Samvat year 1978 Rs. 1,88,750 as remuneration for winding up the estate of Umar Sobhani which being an extraordinary source of income is not liable to taxation."

The Income Tax Officer, however, did not exempt this item from assessment. Thereupon an appeal was lodged before the Assistant Commissioner of Income Tax who held that this item was rightly taxed. Thereupon the assessee applied for a reference and the Commissioner of Income Tax has made this reference on the question raised with his opinion thereon.

It seems strange that in a reference of this kind, the Commissioner has not stated what was the profession, vocation or occupation of the assessee. But it has been admitted during the course of the argument that the assessee is a cotton merchant.

In 1922 there was a crisis in the cotton market owing to endeavours made by the firm of Umar Sobhani to corner the market. He had been compelled to keep on making very extensive purchases of cotton in order to maintain prices, but his resources failing it became known to the creditors of the firm and the market in general, that the firm was not in a position to finance further the huge purchases which had been made so that its failure had become imminent. As a crisis would necessarily result if all its purchases were thrown upon the market, the firm and its creditors looked out for some one who would command the confidence of themselves and of all concerned to hold the cotton already purchased and sell it to the best advantage. The assessee consented to be appointed under a power-of-attorney to dispose of all the cotton bales for and on behalf of the firm, to pay what was due to the several Mucoadams and Banks, and after deducting out the net sale proceeds of the cotton bales all his costs charges and expenses in respect thereof and his remuneration, to distribute the balance amongst the several persons and firms whose names had already been submitted by the firm of Umar Sobhani to the assessee. Under that power-of attorney the assessee sold over 1,00,000 bales which realized about Rs. 1,63,00,000, and received his remuneration Rs. 1,88,750. It will be noted that in his return of income when claiming exemption for this sum, the assessee refers to it as an extraordinary source of income. He does not refer to it as being income not arising from business or the exercise of his profession, vocation or occupation which was of a casual and non-recurring nature. However we may take it that the question now before us is whether the receipts in question can be exempted under section 4 (*3*) (*vii*) of the Act, which says : "'Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employé."

It has been argued for the assessee that these receipts did not arise from business; that "business" connotes continuity, and that only the receipts arising from a business which is carried on continuously can be assessed. But the section refers to receipts arising from "business" and not to receipts arising from "a business." The definition of business in section 2 (*4*) is as follows :—"Business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, and consequently, it is not necessary that the receipts should arise from a business continuously carried on during the year to make them liable to assessment. Even if they arise from a single adventure in business they would be liable to be taxed.

Now it seems clear that the profession or occupation of the assessee being that of a cotton merchant, any receipts arising from the buying and selling of cotton would be considered as arising from trade or commerce, and the argument that receipts from an extraordinary transaction connected with business, such as the one in this case which has only occurred owing to exceptional circumstances, and which would not be likely to occur again for many years, can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a casual and non-recurring nature, cannot be accepted.

We are clearly of opinion, therefore, that the remuneration earned by the assessee owing to his having been appointed under a power-of-attorney by Umar Sobhani to realise the cotton which he had purchased, must be considered as receipts arising from business, and therefore, liable to taxation.

There is no need consequently to consider the argument of the Commissioner with regard to the meaning of the word "business" or the word "casual," or the English authorities which have been cited before us.

The answer to the reference will be that in our opinion the receipts in question are not entitled to be exempted from taxation.

Sd/- N. C. MACLEOD.

Sd/- H. C. COYAJEE.

16th January 1925.

CASE No. 25.

HIGH COURT OF JUDICATURE AT ALLAHABAD.

CIVIL MISCELLANEOUS CASE No. 164 OF 1925.

In re Messrs. Lachhman Das Babu Ram of Cawnpore.

Income-tax Act (XI of 1922), section 64.—Income-tax Officer—Principal place of business—Powers at.

STATEMENT OF THE CASE.

This is a demand for a reference to the High Court under section 66 (2) of the Indian Income-tax Act, 1922, made by Lachhman Das Babu Ram of Cawnpore.

2. The principal place of business of the assessee is in Cawnpore but there are also branches in Bombay, Karachi, and Calcutta. When the assessment for the financial year 1924-25 came to be made, the Income-tax Officer, Cawnpore, received reports from the Income-tax Officers of Bombay and Karachi containing an estimate of the profits of the assessee in those places. The Income-tax Officer in Calcutta however, who had been requested to report the profits of the Calcutta branch after examining the firm's accounts replied that according to the assessee's allegation the books relating to the branch business in Calcutta were at Cawnpore and would be duly produced before the Income-tax Officer: he accordingly reported no estimate of the profits. On the 24th July, 1924, the Income-tax Officer, Cawnpore, issued a notice under section 22 (4) for the production, on the 3rd September 1924, of the books not only of the principal place of business in Cawnpore but also of the several branches. The books relating to Cawnpore alone were produced on that date and a second notice under section 22 (4) was issued, while further the assessee was requested, under the provisions of section 23 (3), to deal with certain ambiguities affecting the accounts of the principal place of business and the branches in Bombay and Calcutta. On the 4th September, 1924, the assessee was further called on under section 22 (4) to produce the accounts of the Cawnpore business for the years Sambat 1977-78 in order to clear up further doubtful points, the date fixed being 30th September, 1924. On that date the assessee asked for an extension of time and was granted up to the 22nd October, 1924. The case was not decided on that date in the absence of proper authority for his representative from the owner of the business and the case was accordingly disposed of on the 23rd October, 1924. The representative when asked why the books of the Calcutta branch were not produced replied that it was most inconvenient that the Calcutta accounts should be produced in Cawnpore and that he was therefore unable to do so. An application was also presented asking that the case might be referred to the Income-tax Officer, Calcutta, for the examination of the accounts of that branch. The Income-tax Officer, considering the delay which had taken place and the failure of the assessee to produce his accounts before

the Calcutta Income-tax authorities in the first instance, refused the request. On this ground, and also because the assessee did not produce the books of the principal place of business for Sambat 1977-78, he proceeded to frame an assessment under section 23 (*4*).

3. On the 24th November, 1924, the assessee presented to the Income-tax Officer, Cawnpore, an application under section 27 of the Indian Income-tax Act, 1922, praying "that the assessment as it stands be cancelled and it be sent to the Income-tax Officer of Calcutta to report the income of that branch."

4. The Income-tax Officer did not consider that the assessee had proved his case and rejected the application. It will be noted that the assessee does not refer to the application of section 23 (*4*) to the assessment which was involved by his failure to produce the Cawnpore books relating to Sambat 1977-78. The Income-tax Officer also in his order does not refer to this point.

5. The assessee filed an appeal before the Assistant Commissioner of Income-tax.

6. The Assistant Commissioner, after hearing arguments, held that the contention of the appellant was in effect not that he had been prevented by any reasonable cause from complying with the notice under section 22 (*4*) but that the Income-tax Officer had no jurisdiction and that the assessment was illegal. He refused to accept this interpretation of the law and rejected the appeal.

7. The assessee, now desires a reference to be made to the High Court on the following questions of law :—

"(1) Whether the Income-tax Officer of Cawnpore, in face of the provisions laid down under section 64 (*4*) and under notes and instructions, has any jurisdiction to issue a notice under section 22 (*4*) for the account-books of the branch shops situate at Bombay, Calcutta and Karachi.

"(2) Whether the provisions laid down under section 64 (*1*) empower an Income-tax Officer of one area in one province to issue notices under section 22 (*4*), etc., and to make an estimate of the income of branch shops situate in a different area and in a different province altogether.

"(3) Whether the assessing officer of the principal places of business can compel the production of the branch accounts before him and him alone.

"(4) Whether the rejection of the petitioner's application regarding the examination of the branch books at the branches was legal.

"(5) Whether there is any evidence to support the finding of the Income-tax Officer of Cawnpore regarding the income of the Calcutta branch.

"(6) Whether the assessment, as made, is *arbitrary or to the best of his judgment* as laid down under section 23 (*4*).

"(7) Whether the Income-tax Officer of Cawnpore or that of Calcutta alone is empowered to estimate the income of the Calcutta branch; and

"(8) Whether the assessment, made under section 23 (*4*) by the Income-tax Officer of Cawnpore on account of the non-production of the books of the Calcutta branch alone, is legal."

In accordance with his previous action he does not refer to the applicability of section 23 (*4*) involved by his failure to produce the accounts of Sambat 1977-78 for Cawnpore.

8. A copy of the above statement of the facts was supplied to the assessee who was also informed that the only points of law which, in the opinion of the Commissioner, could arise and which he proposed to refer for the decision of the High Court were—

(*i*) Was the opportunity given to the assessee to produce certain accounts, and in particular the accounts of the Calcutta branch, reasonable? and

(*ii*) Was the assessee prevented by sufficient cause from producing those books?

The assessee has replied that his "main legal contention" has not been referred to the High Court, *viz.*, that "the Income-tax officer of Cawnpore in face of the provisions laid down under section 66 (*4*) and under notes and instructions had no jurisdiction to issue a notice under section 22 (*4*) for the account books of the branch shops at Bombay, Calcutta and Karachi and to make an estimate of the income of branch shops situate in a different area and in a different province altogether." The Commissioner is of opinion that this point does not arise out of an appellate order relating to section 27 but as the assessee clearly feels aggrieved over the action taken by the Income-tax Officer and as the question is one of some importance, the Commissioner has decided to submit a reference under sub-section (*1*) of section 66 of the Indian Income-tax Act, 1922, on the following point also.

Do the provisions of sub-section (*4*) of section 64 of the Indian Income-tax Act oust the jurisdiction of the Income-tax Officer of the area in which a principal place of business is situated so far as the *assessment* of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned?

9. There are thus three points of law which are submitted for the opinion of the High Court—

(*i*) On the facts stated was the opportunity given to the assessee to produce certain accounts, and in particular the accounts of the Calcutta branch, reasonable?

(*ii*) Was the assessee prevented by sufficient cause from producing those books? and

(*iii*) Do the provisions of sub-section (*4*) of section 64 of the Indian Income-tax Act oust the jurisdiction of the Income-tax Officer of the area in which a principal place of business is situated so far as the assessment of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned?

As regards the first question the Commissioner is of opinion that as the period which was given for the production of accounts was a long one it cannot be said that the assessee had no reasonable opportunity to comply with the notice. The Commissioner is also of opinion that the assessee was not prevented by sufficient cause from complying with the notice. He failed to do so on the ground that he was not obliged to do so. The word "prevent" in section 27 involves some definite active cause, making compliance with the order impossible, and not a passive cause such as the opinion that compliance is not obligatory because of rights supposed to be secured under the Act.

On the third question the answer is, in the opinion of the Commissioner, clearly in the negative.

The Commissioner would add that the present proceedings will be sterile: the assessment under section 23 (*4*) must in any case stand because the failure to produce the Cawnpore accounts for Sambat 1977-78 makes that sub-section applicable.

D. M. STEWART,

Commissioner of Income-tax, U. P.

The 16th March 1925.

Judgment.—The answers to the three points submitted to us are as follows:—

On the facts stated, a reasonable opportunity was given to the assessee to produce the accounts of the Calcutta Branch, first in Calcutta, secondly in Cawnpore, where the Income-tax Officer of Calcutta was led to believe that the books were available.

Secondly, on the evidence stated the assessee was not prevented by sufficient cause from producing the books in Cawnpore.

Thirdly, in our opinion the jurisdiction of the Income-tax Officer of the area in which the principal place of business is situated is not ousted. The jurisdiction is concurrent. Under section 64, sub-section (*1*), the Income-tax Officer of the principal place of business has the duty of assessing the whole of the income derived from the principal place of business as well as the various branches. By sub-section (*4*), every Income-tax Officer has also jurisdiction to exercise the powers of an Income-tax Officer with regard to the profits rising in that area.

It is of course understood and ought to be understood, by the authorities that the Income-tax Officer of the principal place of business will not exercise his powers oppressively so that persons willing to submit to the requirements of the Income-tax Officer of the particular area in which the Branch is situated should not be deprived of an opportunity of supplying him with all proper materials but exceptional cases may require exceptional remedies.

Sd. C. W.

Sd. L. G. M.

The 26th March 1925.

CASE No. 26.

CIVIL REFERENCE No. 20 OF 1924.

IN HIS MAJESTY'S HIGH COURT OF JUDICATURE, APPELLATE SIDE, BOMBAY.

Civil.

In the matter of Amratlal K. Gandhi.

Income-tax Act (XI of 1922), Dividends, section 50, "Tax recovered" Meaning of.

Upon reading letter No. A.-58, dated 22nd October 1924 from the Commissioner of Income-tax, Bombay Presidency, sent to us in our High Court of Judicature at Bombay referring under section 66 (*2*) of the Indian Income-tax Act, 1922, *re* the interpretation of section 50 in the matter of refund of income-tax on dividends received from a company claimed by Mr. Amratlal K. Gandhi and upon hearing the Honourable Advocate General instructed by the Government Soliciter.

The Court ...

VOLUME II.

Page 53.—Last line of the order in Case No. 26—For the word "paid". substitute the word "declared".

CASE No. 27.

HIGH COURT, PATNA.

MISCELLANEOUS JUDICIAL CASE No. 58 OF 1924.

I. L. R., Vol. IV, Patna, page 210.

Sir Saiyid Ali Imam.

versus

The Crown.

Income-tax Act, 1922 (Act XI of 1922), section 4 (*1*).—Liability to tax—Honorarium—Received—Meaning of.

Dawson Miller, C. J.—This matter comes before us on a reference made by the Commissioner of Income-Tax under section 66 (*1*) of the Income-Tax Act, 1922. The question for our decision, as stated by the Commissioner, is :

"Whether when an assessee was appointed to a salaried post for five years (though without any contract or agreement) was allowed to resign before the expiry of five years and was granted an honorarium in a lump sum equal to the salary which he would have drawn if he had served for the whole five years, this sum is liable to taxation."

The question thus stated in somewhat general terms must be answered with reference to the particular facts found in the case. Two points were argued on behalf of the assessee, first, that the sum so paid was not salary, within the meaning of section 7 (*1*) of the Income-tax Act, 1922, and, secondly, if this should be decided against him, that the sum which was directed by the employer to be paid to the assessee through the Patna branch of the Imperial Bank of India but was first paid to the Hyderabad branch of that Bank and from there transferred to the assessee's account at Patna is to be regarded as having been received at Hyderabad and not in British India. It will be convenient to deal with the second point first.

The assessee, Sir Ali Imam, according to the facts found was offered and accepted the post of President of the Executive Council of His Exalted Highness the Nizam of Hyderabad for five years on a salary of Rs. 7,000 per month. His employment began on the 20th August 1919. After serving for just over three years, namely, on the 4th September 1922, he resigned his office. His resignation was accepted and he made over charge of his office on September 6th, 1922, to his successor. Subsequently on the same day the Nizam issued a *firman* in the following words :

"As owing to certain reasons Sir Ali Imam has asked to be relieved of his duties I have accepted his resignation. I take this occasion to express my appreciation of the loyal devotion with which he has performed the duties of his high office during the past three years."

He then directs Sir Faridoon Mulk to act as his successor until permanent arrangements are made for filling up the appointment. The document then continues as follows :

"I also hereby order that payment should be made to Sir Ali Imam through the Imperial Bank of India of the honorarium at the rate of seven thousand British Government rupees per mensem due to him for the two years which will remain to be completed out of his term of office of five years and a formal receipt obtained."

Then follow certain directions as to minor arrangements connected with the President's office which are not material and the document ends thus :

"Ordered that this my *firman* be read out by Sir Faridoon Mulk on Thursday the 14th of the present month of *Muharram* in the Executive Council in the presence of the Members, and that it should be published immediately by notification in a Jarida Extraordinary."

On the evening of the 6th September Sir Ali Imam left Hyderabad for Patna where he arrived a day or two later. On the 8th September, the Finance Member of the Nizam's Government asked the Agent of the Hyderabad branch of the Imperial Bank to arrange to pay the sum in question, which amounted to Rs. 1,63,333-5-4, to Sir Ali Imam through their Patna branch and to take a formal acknowledgment from him. On the 9th September the Agent of the Hyderabad branch wrote to the Agent of the Patna branch of the Bank enclosing duplicate receipts to be signed by Sir Ali Imam and requesting him to pay the amount named to Sir Ali Imam and return the receipts signed in duplicate. On the 13th September the Patna branch sent the receipts to Sir Ali Imam who was at that time in Patna requesting him to sign and return the same. The receipts were in the following form :

"Received from the Imperial Bank of India, the sum of rupees one lakh, sixty-three thousand, three hundred and thirty-three, annas five and pies four only, being amount placed at my disposal by Imperial Bank of India, Hyderabad, Deccan, under instructions from the Finance Member, His Exalted Highness the Nizam's Government, *vide* their letter No. 555, dated 8th September, 1922, being my pay for the unexpired portion of my term."

The receipts were duly signed by Sir Ali Imam who, on the 16th September, enclosed them with a letter to the Patna branch of the Bank requesting them to instruct the Hyderabad branch to place the money to his credit at the Hyderabad branch until further instructions. On the same day the Patna branch wrote to Hyderabad forwarding a copy of the letter received requesting the money to be placed to the assessee's credit with the Hyderabad branch of the Bank. They added in that letter that no entry had been passed at the Patna branch, which I take to mean that the money had not been credited to Sir Ali Imam by any book entry at the Patna branch. About a fortnight later, on the 30th September 1922, Sir Ali Imam wrote to the Agent of the Imperial Bank of India at Hyderabad to transfer the balance standing to his credit at their branch to his account with the Patna branch. On the 4th October the Hyderabad branch instructed the Patna branch to place the sum in question to Sir Ali Imam's credit in Patna which was accordingly done. It is conceded by the Government Pleader on behalf of the Commissioner of Income-Tax that salaries earned by a British subject outside British India are not ordinarily chargeable under the Indian Income-Tax Act and it is not contended that the income earned by Sir Ali Imam as President of the Nizam's Executive Council before his resignation was taxable. Section 1 of the Act, which limits the area to which the Act applies, provides in sub-section (*2*) as follows :

"It extends to the whole of British India, including British Baluchistan and the Santal Parganas, and applies also, within the dominions of Princes and Chiefs in India in alliance with His Majesty, to British subjects in those dominions who are in the service of the Government of India or of a local authority established in the exercise of the powers of the Governor General in Council in that behalf, and to all other servants of His Majesty in those dominions."

It appears therefore that although the Act extends to certain classes of persons within the dominions of the ruling Princes and Chiefs in India the assessee was not one of the persons named in the sub-section. He was neither in the service of the Government of India or of the local authority there mentioned nor was he a servant of His Majesty in those dominions. It was the opinion, however, of the Commissioner of Income-Tax that, in the circumstances which I have already referred to, the sum in question must be taken as having been received by the assessee in British India within the meaning of section 4 (*1*) of the Act. That section provides as follows :

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

There are two cases and only two referred to in the Act where profits received outside British India are deemed to have been received in British India. The first appears in section 4 (*2*) and relates to the profits and gains of a business accruing without British India to a person resident within where such profits or gains are brought in within

three years of receipt. The second appears in section 11 which provides that professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be professional earnings which are taxable under section 6. Neither of these provisions apply to the present case nor was it so contended. The sum in question in the present case was neither the profits of a business nor professional fees. The question for determination, therefore, is whether, in the circumstances stated, the sum in question can be said to have been received in British India within the meaning of section 4, sub-section (*1*). It should be stated, as would appear from the correspondence which has been printed with the record, and indeed it is not disputed, that at all material times the assessee as well as the Nizam had an account with the Hyderabad branch of the Imperial Bank of India although this fact is not specifically mentioned in the statement of the case. The opinion of the Commissioner of Income-Tax is expressed thus :

"In my opinion the sum is taxable, because it was really received by the assessee in British India on September 16th. The instructions of the Finance Member show the intention of the employer and the assessee's acknowledgment, signed at Patna, constitutes a receipt in British India. The effect of his instructions of September 15th was to transfer the amount back to Hyderabad; if he had not given these instructions, the amount would clearly have remained at Patna."

This passage quoted from the case submitted is merely an expression of opinion. It is not conclusive as a finding of fact. The fact found in the earlier part of the case is that the sum was first paid to the Hyderabad branch and from there transferred to the assessee's account at the Patna branch. The question for our decision is as to the meaning which should be given to the word "received" in section 4 of the Act and it is still open to us to consider that question notwithstanding that in the opinion of the Income-Tax Commissioner the money was received in British India on September 16th. It is true that the money was eventually received by the assessee in British India in the sense that it was transferred from his account at Hyderabad to his account at Patna but the receipt of the income referred to in section 4, must, in my opinion, refer to the first occasion upon which the recipient got the money under his own control. This question was considered by the Full Bench of the Lahore High Court in 1922 (see Sunder Das v. The Collector of Gujrat) where it was held under the Income-Tax Act of 1918, section 3 sub-section (*1*) that income earned and received in British Baluchistan (which at that time was exempt from the operation of the Act except as to salaries paid by Government) and subsequently brought into or transmitted into the Punjab was not liable to be assessed to income-tax not having been received in the Punjab within the meaning of sub-section (*1*) of section 3 of the Act of 1918 which is similar in terms to section 4, sub-section (*1*) of the Act of 1922. The same view was also taken by a special Bench of the Madras High Court in the following year in the case of Secretary, Board of Revenue, Income-Tax, Madras v. The Ripon Press and Sugar Mills Company where the decision of the Lahore High Court was approved and followed. I entirely agree with the judgments pronounced in those cases.

It remains to consider, however, upon the facts stated at what period of time did the assessee actually receive the money. The Commissioner was of opinion that the instructions of the Finance Member of the Hyderabad State to the Hyderabad branch of the Bank to arrange for payment to the assessee through their Patna branch showed the intention of the employer, but the question for determination is not what the intention of the employer was but what the actual fact is. Incidentally I may remark that it was of no moment to the employer whether the money was placed to the assessee's credit at Hyderabad or at Patna; but the Commissioner further considers that the assessee's acknowledgment signed at Patna constitutes a receipt in British India. The written acknowledgment of receipt is undoubtedly evidence of the fact that the money has been received but it is not conclusive. Such receipts are frequently demanded before actual payment of the money and there can be no question that in the present instance nothing was credited to the assessee in the books of the Patna branch of the Bank up to the time the acknowledgment was signed on the 16th September or at any subsequent time until after the money had been placed at the credit of the assessee in his account with the Hyderabad branch. The Commissioner has expressed the view that the effect of the instructions given by the assessee to the Patna branch of the Bank on the 16th September was to transfer the amount back to Hyderabad and that otherwise it would have remained at Patna. This argument appears to me, with due respect to the Commissioner, to be fallacious. There was nothing to transfer. The money had not been paid and no credit entry in favour of the assessee had been made in the books of the Patna branch of the Bank. The fact is that sometime in September the money was first credited to the account of Sir Ali Imam in Hyderabad and was subsequently, by a letter dated the 4th October, transferred from the branch of the Imperial Bank there to the Patna branch. In this state of affairs I have no hesitation in finding that the sum in question which is sought to charge was received by the assessee at Hyderabad outside British India and that section 4, sub-section (*1*), of the Act has no application.

The further point was also argued by the assessee, *viz.*, that even if the money was received at Patna it was not taxable as "salary" within the meaning of section 7 (*1*) of the Act. That section provides as follows:

"The tax shall be payable by an assessee under the head salaries in respect of any salary or any wages, any annuity, pension or gratuity and any fees, commissions, perquisites or profits received by him in lieu of, or in addition to, any salary or wages, which are paid by or on behalf of Government, a local authority, a company, or any other public body, or association, or by or on behalf of any private employer."

It was contended on the authority of the English cases of Turner v. Cuxon and Cowan v. Seymour and the Scotch cases of Duncan's Trustees v. Inland Revenue Commissioners, that voluntary payments made in circumstances such as the present to the holder of an office did not accrue by reason of his office or employment. These cases were decided under the English Income-Tax Acts of 1842 and 1853 in which the wording is not similar to that of section 7 (*1*) of the Indian Income-tax Act of 1922. The section of the Indian Income-Tax Act is very wide and includes fees, commissions, perquisites or profits received in lieu of or in addition to any salary or wages. The question whether the payment made in the present case was made as a gratuity in addition to the assessee's salary or was merely in the nature of a testimonial or mark of affection or respect to the recipient raises points of some difficulty, but in view of the opinion already expressed on the other point it is unnecessary to decide this question for even assuming, without deciding, that the sum received was salary within the meaning of section 7 (*1*) of the Act, it was not received in British India within the meaning of section 4 (*1*), and is, therefore, not chargeable to income-tax.

The answer to the question upon which our decision is asked should, in my opinion, be in the negative with reference to the facts found in the case. The petitioner is entitled to his costs including the costs incidental to printing the paper book.

Mullick, J.—I agree. I think the reference must be decided in favour of the petitioner on the ground that the income was neither received in British India nor such as can be deemed to have been so received. If it be urged that it is sufficient that the money was brought into British India, the reply is that it is not permissible to base an argument on the English Acts and on the case of Gresham Life Assurance Society, Limited v. Bishop. The Indian Act seems clearly to contemplate that income accruing outside British India shall not be taxable unless (1) it is received in British India or is deemed to accrue or arise or to be received in India or (2) unless it constitutes the profits and gains of a business received or brought into British India within the meaning of section 4, clause (*2*) of the Act. Whatever the English law may be upon the subject I think the Indian Act requires that the income earned by the petitioner at Hyderabad should have been actually received in British India and on the facts found I think it is clear that it was not so received; nor is there any provision in the Act such as section 11 by reason of which it can be deemed to have been received in British India. Further, not being profits and gains arising from a business, it was not sufficient merely to bring in the money after receipt.

With regard to the question whether the income was derived from salaries, I agree that it is unnecessary to decide the point.

CASE NO. 28.

HIGH COURT, PATNA.

Miscellaneous Judicial Cases Nos. 64 and 66 of 1924.

I. L. R., Vol. IV, Patna, page 385.

Babu Jagarnath Therani (Petitioner) . . . . . Appellant,

versus

The Commissioner of Income-tax (Opposite party) . . . Respondent.

For the Appellant.—Messrs. K. P. Jaysawal, Rai Guru Saran Prasad and Anand Prasad.

For the Respondent.—

Income-tax Act (XI of 1922), sections 10, 22, 23, 30, 31 and 34.—Assistant Commissioner, power to assess income escaping assessment—Allowances in assessing business income —Admissible embezzlement by employee.

Ross, J.—Babu Jagarnath Therani carried on business at Kishanganj in the district of Purnea and had branches in Calcutta and Jalpaiguri. He used to make returns of

his income in all three places and the income-tax authorities in Calcutta and Jalpaiguri reported their findings to the Income-tax Officer at Purnea who then combined the figures and made an assessment to income-tax. In the year under consideration, 1922-23, the Income-tax Officer at Purnea made the assessment without waiting for the reports from Calcutta and Jalpaiguri. It appears from the order of the Assistant Commissioner of Income-tax that after making his assessment he noted that assessment would be made on receipt of the reports from the income-tax authorities at Calcutta and Jalpaiguri as heretofore.

The assessee appealed against the assessment to the Assistant Commissioner, who, while reducing the assessment on the business at Purnea, enhanced the assessment as a whole by including the income derived from the branch businesses in Calcutta and Jalpaiguri. Three items were included in arriving at this enhanced sum : *viz.*, a sum of Rs. 25,000 which had been embezzled by a Gomashta in Calcutta, a sum which was excluded from assessment by the Calcutta authorities, and two sums of Rs. 2,939 and Rs. 361 on account of Basa Kharach and Bidagri respectively which had also been excluded in Calcutta.

The Commissioner of Income-tax has stated a case to this Court on four points : (1) whether an Assistant Commissioner of Income-tax when hearing an appeal under Sections 30 and 31 of the Indian Income-tax Act can assess a source of income which was not assessed at all by the Income-tax Officer; (2) whether the sum of Rs. 25,000 embezzled by the Gomashta of the assessee can be deducted from the assessable income ; (3) whether the expenditure called Basa Kharach is an admissible allowance; and (4) whether Bidagri is an admissible allowance. The case on the last three points was stated by the Commissioner under the directions of this Court on the application of the assessee.

I shall deal first with the last three points as they are of minor importance. Under the provisions of Section 10 of the Act the tax is payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him; and, in computing such profits or gains allowance is to be made *inter alia* in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. The practice in England seems to be well-settled that sums embezzled are excluded from assessment; see Sanders' Income-Tax and Super Tax, Second Edition, page 191 "Loss from embezzlement is deductible"; Murray and Carter's Guide to Income-Tax, Practice, Ninth Edition, page 263 "A loss by reason of embezzlement by an employee used to be looked upon as a loss by stratagem, and not one connected with, or arising out of, trade, and it used to be said that the amount could not be deducted. Such a loss, however, is now for income-tax purposes deemed an expense of the year in which it is written off in the books"; and Snelling's Dictionary of Income-Tax and Super-Tax Practice, Fifth Edition, page 231 "If a loss by embezzlement can be said to be necessarily incurred in carrying on the trade it is allowable as deduction from profits. In an ordinary case it springs directly from the necessity of deputing certain duties to an employee, and should therefore be allowed." In my opinion, this was not a loss in the nature of capital expenditure but was a loss incidental to the conduct of the business and allowance should be made on this account.

Basa Kharach is stated by the Commissioner of Income-tax to be the boarding expenses of servants, and Bidagri to be payment to a servant of his expenses incurred in going to his home from the place of employment and back again. These do not seem to me to be in any sense gratuities and it cannot be assumed that there is any charitable element in these payments. These payments are apparently made to servants in order to retain their services for the benefit of the business and to increase their efficiency. In my opinion these payments are made solely for the purpose of earning profits or gains and allowance should be made on account of these sums.

With regard to the principal question, the learned Counsel for the assessee contends that the jurisdiction to assess income tax upon the businesses in Calcutta and Jalpaiguri was exercisable by the Income-tax Officer, and the passage already quoted from the judgment of the Assistant Commissioner shows that this jurisdiction had been reserved by the Income-tax Officer to himself and that he intended to exercise it. It would appear from the provisions of Section 64 that as Purnea is the principal place of business, the assessment should be made by the Income-tax Officer of that district, the authorities in Calcutta and Jalpaiguri reporting to him. It is argued that the so-called enhancement made by the Assistant Commissioner on appeal is illegal on three grounds : (1) Section 34 expressly provided for the assessment of sources of income that have escaped assessment by the Income-tax Officer; and, where there is an express provision of law applicable to the circumstances of the case, that procedure ought to have been followed. (2) By the procedure adopted by the Assistant Commissioner in assessing on appeal the income from the businesses at Jalpaiguri and Calcutta the assessee has lost the right of appeal on quetions of fact relating to these sources of income. (3) By Section 31 the Assistant Commissioner in disposing of an appeal may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment. It is contended that "the assessment" means the assessment made by the Income-tax Officer which itself under

Section 23 is based upon a return; but, in the present case, there was no such assessment so far as the business in Jalpaiguri and Calcutta was concerned and, consequently, the so-called enhancement made by adding these new sources of income was not an enhancement of the assessment made by the Income-tax Officer.

In reply to these arguments the learned Government Pleader contended that the terms of section 31 (*3*) (*a*) are general and give power without qualification to enhance the assessment. Now this Section relating to appeals is enacted for the benefit of the subject and also to the limited extent therein stated, for the benefit of the Crown. But the subject matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject matter. The appellate authority has no power to travel beyond the subject matter of the assessment and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income. To do so would not in reality be enhancing the assessment but adding a new assessment to the old, the subject matter being different.

I would therefore answer the points stated by the Commissioner of Income-tax in the manner indicated above. The petitioner is entitled to his costs. Hearing fee three gold mohurs.

R. L. ROSS.

Kulwant Sahay, J.

I agree.

KULWANT SAHAY.

PATNA HIGH COURT,
The 13th January 1925.

Ross, J. and Kulwant Sahay, J.

The petitioner is entitled to the cost of the printing of the paper books and to the refund of the deposit which he made before the Commissioner of Income-tax.

R. L. ROSS.

KULWANT SAHAY.

15th January 1925.

CASE No. 29.

HIGH COURT, PATNA.

MISCELLANEOUS JUDICIAL CASE No. 136 OF 1924.

Income-tax Commissioner of Bihar and Orissa . . . . Petitioner,

versus

Babu Shiva Prashad Singh. Zamindar of Jharia . . . . Opposite party.

For the petitioner.—The Government Advocate.

For the opposite party.—Messrs. N. C. Sinha, N. C. Ghosh and B. B. Ghosh.

Income-tax Act (XI of 1922), section 10 (*2*) (*ix*).—Deductions from taxable income—Mining royalties—Cesses—Bihar and Orissa Mining Settlements Act—Jharia Water Supply Act.

Dawson Miller, C. J.—This matter comes before us on a case stated by the Commissioner of Income-tax under section 66 (*1*) of the Income-tax Act, 1922. The assessee in the case is the Raja of Jharia who derives a considerable income as the owner of royalties which he receives under mining leases, of which he is the lessor, in the Jharia coal fields. The question for our opinion is whether in arriving at the taxable income

derived from that source the assessee is entitled to deduct certain cesses or rates imposed upon the owner of such royalties under two local acts known as the Jharia Water Supply Act of 1914 and the Bihar and Orissa Mining Settlements Act of 1920. Under the former Act a cess is leviable within the area prescribed both upon the owners of coal mines and upon the holders of royalties from those mines. In the case of mine owners who are themselves working the mines the cess is a cess on the annual despatches of coal and coke from the mine and would be payable apart, altogether from whether any profit is derived from the actual working of the mine. In the case of a person receiving royalties from mines the cess is paid upon the royalties received at a certain rate which is determined by the Board with the approval of the local Government subject to a maximum of 5 per cent. on the assessed amount of royalty. Under the latter Act of 1920 a somewhat similar rate is imposed under section 23 both upon the owners of mines and upon persons who receive any royalty rent or fine from such mines. In this case the assessment is based, in the case of owners of mines, on the actual output of their mines, and here again the assessment in the case of owners is apart from any profit that may or may not be derived from the working of the mine. In the case of receivers of any royalty rent or fine their assessment is calculated on a percentage of road cess payable by such person. At present the amount is one-fifth, or 20 per cent. of the average yearly road cess payable by such persons in respect of their royalties during the last three years.

The only question which arises for decision in the case is whether under section 12 of the Indian Income-tax Act, these cesses or taxes can be deducted in arriving at the taxable income for the purpose of income-tax. It was decided in the case of Jyoti Prasad Singh Deo (6 P. L. J. 62) that income derived from royalties came within section 12 of the Income-tax Act which relates to the income derived from "other sources" and not under section 10 which applies to income under the head of "business." The deductions which may be made from the different classes of income mentioned in the Act are stated in detail in the different sections dealing with different heads of income, and under section 12 which applies to the present case it is provided that the tax shall be payable by an assessee under the head "other sources in respect of income, profits and gains of every kind and from every source to which this Act applies if not included under any of the preceding heads. By clause (2) of the section—and this is the important part of the enactment—such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee. Now the only allowances or deductions which are permissible in the case of income derived from "other sources" referred to in section 12 are those already mentioned in clause (2) of that section, namely, any expenditure incurred solely for the purpose of making or earning any income, profit or gain. It is contended in this case that the deductions leviable under the two Bihar and Orissa Acts to which I have referred are expenditure incurred for the purpose of making or earning such income. The case of the K. M. Selected Coal Company of Manbhum (I. L. R. 3 Pat. 295) was relied on in support of this contention. But the reasons for that decision do not apply in this case. There the assessee was the lessee of the mines and the income taxed was profits derived from business. The local taxes as already stated in such a case are levied on the output or despatches apart from the profits of the business and whether a profit is made or not and must be taken into account in ascertaining whether there is a profit which is subject to income-tax.

The present case appears to me to be governed by the principle adopted in the earlier case of Raja Jyoti Prasad Singh Deo (6 P. L. J. 62). In that case this Court decided that in determining the taxable income derived from royalties, cesses payable under the Cess Act, that is to say Road Cess and Public Works Cess, cannot be deducted in arriving at the taxable income under the head of royalties and the only question is whether there is any distinction between the case of a road cess and the case of the cesses imposed under these two Acts. In that case it was argued, as has been argued here, that the taxes should be deducted in order to ascertain what was the actual income. It was pointed out however, that the cess, that is the road cess, was leviable upon exactly the same income as the income-tax itself and, following the case of Manindra Chandra Nandi v. The Secretary of State for India (I. L. R. 34 Cal. 257) which held that income-tax could not be deducted in order to ascertain the amount upon which the road cess was leviable, this Court held that, similarly you could not deduct the road cess in order to ascertain the amount upon which the income-tax was leviable because both taxes were imposed upon the same income and it was therefore pointed out that the liability to pay the road cess resulted from the income having been made, and the payment of the cess could hardly be said to form a necessary part in the earning of the income which must come into existence before the liability to cess arises, and although the payment of cess was a necessary expense arising in connection with the ownership of royalty it was nevertheless in no sense an expenditure incurred for any purpose incidental to the making of the income. No argument has been adduced

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before us in this case which distinguished the case of the cesses imposed under these Acts from the case of road cess. It seems to me that in both cases the cess is imposed upon exactly the same income and the mere fact that income-tax is also imposed on that income is in itself no reason why the cesses should be deducted in order to ascertain the taxable amount of income any more than it is why the income-tax should be deducted in order to ascertain the amount of cess. I can see no distinction in principle between the present case and the case of Raja Jyoti Prasad Singh Deo (6 P.L. J. 62) and in my opinion the Income-tax Commissioner arrived at a proper conclusion in the case which he stated for our opinion.

DAWSON MILLER.

Patna, the 27th April 1925.

Jwala Prasad J.—The royalties derived by the owners of lands containing minerals give rise to the following taxes :—

(1) Cess levied under the Cess Act (IX of 1880 B. C.) as amended by the Bihar and Orissa Act I of 1916. That cess is a cess on the annual net profits derived from the mines contained within the zemindari in the shape of royalty.

(2) Cess levied under the Jharia Water Supply Act III of 1914 on royalties derived from mines, and

(3) A tax under the Bihar and Orissa Mining Settlements Act IV of 1920 assessed on the local cess payable by the zemindar who owns the lands in which the mine is situated.

It is thus clear that the sources of the three taxes are the same, namely, the amount of royalty received by the zemindar and each of them is to be assessed irrespective of what is paid under the remaining two Acts. Therefore the payments made with respect to any one of the aforesaid taxes cannot be taken into account in the assessment made for the tax payable under the other Acts. The result is that the taxes payable by the assessor in the present case under the Jharia Water Supply Act as well as the Bihar and Orissa Mining Settlement Act cannot be deducted from the royalty received by him in assessing the tax payable under the Income-Tax Act of 1922. I therefore agree with the order of my Lord the Chief Justice.

JWALA PRASAD.

HIGH COURT PATNA,
The 27th April 1925.